CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF LOUISIANA.

EASTERN DISTRICT, MAY TERM, 1823.

East'n District
May, 1823.

ROBERTSON
vs.
LUCAS.

ROBERTSON vs. *LUCAS.*

When a commission is directed to a justice of the peace by name, it is not required to show his qualifications.

Former declarations of a witness may be received to contradict the evidence he gives on trial.

Deposition cannot be read when the opposite party had not received notice of the time and place of taking them.

Proof by a witness that he once had a written paper, and that he does not

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The petition avers that the plaintiff purchased of Asa M. Robertson a raft of cypress logs, which the said Asa had acquired from Elijah Burrel; that the defendant had taken possession of them, and refuses to deliver them up.

The defendant pleaded the general issue and title in himself, there was judgment for him in the court below, and the plaintiff has appealed.

Several bills of exceptions were taken on

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the trial. The first was, to any new evidence being introduced by the plaintiff, as the cause had been remanded for the defendant's testimony alone.

know what has become of it, will not authorise the introduction of secondary evidence to establish its contents.

The maker of a deed is the best witness to prove its execution.

The intimation of the district court to the defendant on the first trial, that it was not necessary for him to introduce any evidence, was the cause of our remanding the case, as under our view of it, that evidence was necessary, to do justice between the parties. But in remanding it for this purpose, we necessarily remanded it for a new trial generally, for we could not get the evidence in any other way, and the trial being once gone into, neither party could be prevented from introducing other legal testimony.

Depositions being taken under a commission directed to one Andrew Letting, it was objected that they could not be read because it was not shown he was a justice of the peace for the territory of Arkansaw. It was not necessary to show it, as directing a commission to him by name, made him an officer of the court *ad hoc*, and dispenses with any proof of his qualification to discharge the duty imposed on him. His certificate, that the depositions were taken before him, is full proof of that

fact. The judge therefore did not err in admitting them to be read in evidence.

Neither did he err in rejecting hearsay testimony, of what was said by Burrel and other persons. Nor in rejecting parol evidence, to explain a written contract which on the face of it required no explanation; nor in permitting former declarations of a witness to be received, to contradict his evidence as given on trial. *Phillips on Evidence*, 230. Nor in refusing to suffer depositions to be read, when the opposite party had not received notice of the time and place of taking them.

The deposition of one Hoskins was offered, to prove that a written agreement had been entered into by Blunt and the plaintiff, that it was lost or destroyed, and what were its contents. The witness swore that it was once in his possession, and that he did not know what was become of it. This is not sufficient proof of the loss of the written title, to authorise the introduction of secondary evidence. He who has lost his titles without being able to show any fact to which their loss can be ascribed, or proving an overpowering force, is not permitted to resort to parol testimony to establish their existence and contents. *Civil Code* 312, *art.* 247.

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We think Robertson was a good and the best witness to prove, that he had executed the instrument of writing under which the plaintiff claims, and that the judge did not err in admitting him to testify. 2 *Johnson* 454, *Hall* vs. *Phelps*, 3 *Johnson* 477.

Settling these questions, raised by the bills of exceptions, enables us to reach the merits of the controversy.

Both plaintiff and defendant claim under one Burrel, and his deposition was introduced and read in evidence by defendant, to show the real nature of the contract between Burrel and Asa M. Robertson, the plaintiff's vendor. By this evidence it is proved that the latter bought of the former a raft of timber, for a certain sum payable in a watch and merchandise, $400 in two months from the date of sale, and $450 worth of cattle, with the condition that in case the first payment was not made, the property sold should revert to the vendor, and the watch and merchandise which were delivered at the time of sale, should be forfeited. Under this contract possession was given to the vendee of the raft, and the buyer having failed to comply with his agreement, the vendor took the property by force and and sold it to the defendant.

It appears by an agreement entered on record, that the place where the sale was made is governed by the common law of England, and the main question in the cause is whether on the facts just stated there was such a transfer of the property to the vendee, as prevented the vendor taking it by force on an alleged failure. The judge of the district court was of opinion that the plaintiff had forfeited his title to the raft in consequence of his not having complied with his agreement.

We are of the same opinion. The cardinal rule in cases of this kind is, if possible, to give effect to the intention of the parties. In this now before us, there is no doubt their intention was, that the vendor should have the property again, if the buyer failed to comply with his contract. The delivery was conditional; Burrel could have maintained trover for the raft. We see nothing in the law of England which enables us to say that the vendor forfeited his right by violently taking possession, irregular and improper as the act certainly was.

The judgment of the district court is affirmed with costs.

Ripley for the plaintiff, *M'Caleb* for the defendant.

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SENNETT vs. PIERCE & AL.

SENNETT vs. PIERCE & AL.

APPEAL from the court of probates.

Evidence that a charge made in an account is the customary price in the city of New-Orleans is not proof of its correctness.

PORTER J. delivered the opinion of the court. The petition was employed under the orders of the court of probates to make an admeasurement and valuation of certain buildings, built by the late H. B. Latrobe, for which he claims from the curators of the estate $697 6 cents. This amount is claimed on the ground that the custom of the city is to allow workmen, or others, skilful in such labour as the petitioner was called on to perform, 2½ per cent. on the amount of the property valued and measured by them.

The curators admit his appointment, but aver that all the property estimated, did not belong to the deceased, and that the charge is exorbitant. The court of probates were of the same opinion, and gave the plaintiff judgment for $60 and costs—he appealed.

The testimony on the trial is contained in the declarations of four persons, who swear that the charge of 2½ per cent. on the value of the property estimated, is the usual charge of the city; that they have paid it, and one of them declares that the deceased himself

charged that sum on an estimation made by him of work executed by the witness.

None of the witnesses swear that the labour of the plaintiff is worth so much, or furnish us with any data, by which we can ascertain it. The question then is, whether we are authorized to infer the value of work and labour, from a custom to pay a certain price for it. We think not; for unless we admit the custom to have the force of law, the present defendants cannot be affected by what other persons think proper to pay. It is to them *res inter alios acta.*

There is nothing on record which enables us to see on what ground the judge fixed the compensation at $60. We are unable to affirm his judgment, and do therefore order, adjudge and decree, that the judgment of the court of probates be reversed, that this case be remanded for a new trial, and that the appellees pay the costs of this appeal.

Hennen for the plaintiff, *Carleton* for the defendants.

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PATTERSON vs. LAFARGE.

PATTERSON vs. *LAFARGE.*

If the plaintiff fails to answer interrogatories the defendant may at his option move to have the suit dismissed, or go on to trial and take them as confessed.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The plaintiff having failed to answer distinctly one of the defendant's interrogatories, the latter excepted to the answer, and afterwards prayed that the suit be dismissed. On the refusal of the court, he took a bill of exceptions. Judgment being afterwards given for the plaintiff, the defendant appealed.

His counsel now urges that this court ought to correct the error of the judge *a quo*, in refusing to dismiss the suit.

The act of the legislative council, commonly called the court law, provides that on the failure of the plaintiff to answer the defendant's interrogatories, "his suit shall be dismissed, at his costs, on the motion of the defendant." 2 *Martin's Digest*, 160, *n.* 9.

The plaintiff's counsel urges that this part of the law is repealed, by a posterior one, which provides that if either party refuses or neglects to answer said interrogatories, or any of them, the fact on which he refuses or neglects to answer, shall be taken for confessed; and the court shall proceed, in consequence of

that proof, in rendering judgment. *Civil Code*, 316, *art.* 261. It is insisted that, as this provision is contrary to the former and cannot stand therewith, it virtually, though impliedly, repeals it, as the court cannot *dismiss* the suit, and *proceed*, in consequence of that proof, in rendering judgment.

It appears to us the remedy is *cumulative*—that the defendant may at his option move for a dismissal of the suit—but that the new provision is only a direction to the court, to take the fact *pro confesso*, (in case the defendant does not avail himself of the right of moving to dismiss) and to proceed in consequence of that proof, in rendering judgment; *i. e.* in case it be called upon by either party, in the regular course of the trial, to render judgment.

Nothing shows any intention in the framers of the code to repeal the former provision. The new one is different, but not contradictory or inconsistent. The direction to take the fact as confessed, and to proceed in consequence of that proof, in rendering judgment, does not necessarily deprive the defendant of the right of preventing any judgment from being given, if he see fit, by a motion to dismiss.

The latter statute is an affirmative one, and

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contains no negative words—it is therefore our duty not to consider any preceding statutory provision, as repealed by it—to consider the act of the legislative council and the code, as two statutes in *pari materia*—and to construe them as if all their provisions were included in *one* statute.

If therefore a statute began, by giving to the defendant the right of dismissal, at his option, on the plaintiff's failure to answer interrogatories, and afterwards provided that the interrogatory unanswered should be taken as confessed, and the court should proceed, in consequence of that proof, in rendering judgment, it would be the duty of the court, in order to give force and effect to every part of the statute, to conclude that the legislature had made the second provision for the case, in which the defendant did not resort to the first.

We are the more readily to adopt this conclusion, when we observe that the framers of the code refer us for the form of the interrogatories, and the rules to be observed in them, as settled by the law regulating judicial proceedings, (*art.* 259) evidently referring us to the act of the legislative council, on which the defendant's counsel relies.

Were we to hold that the civil code repeals the provision of the former act, invoked by the defendant, we would be bound to say, when called upon, that the defendant needs no longer the judge's fiat to compel the plaintiff's answer to interrogatories. For the code says, the right is *reciprocal*—or, that the plaintiff now wants such a fiat, when he wishes to interrogate the defendant. For a right which is *absolute* as to one party, and depends on his will alone, is not reciprocal, if, as to the other, it be conditional and limited, and require the assent of a judge. In practice the provision alluded to, has been considered as unrepealed, and defendants have always applied for the *fiat*. If there be no repeal in this part of the former act, there cannot be any in the one we have been considering.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled and reversed; and, proceeding to give such a judgment, as in our opinion ought to have been given by the court *a quo*, it is ordered, adjudged and decreed, that the plaintiff's suit be dismissed, and that he pay costs in both courts.

Livingston for plaintiff, *Dennis* for defendant.

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DUPEY & AL. vs GREFFIN'S EX.

DUPEY & AL. vs GREFFIN'S EXECUTOR.

APPEAL from the court of the first district.

A forced surrender cannot be ordered of the estate of a deceased person, it must be administered under the authority of a court of probates.

MATHEWS J. delivered the opinion of the court. This case differs very little from the cases of *Vignaud* vs. *Tounacourt*, Curator, *Bailio* vs. *Nelson*, and *Cox* vs. *Martin's heirs*, wherein it has been determined that a court of probates has exclusive jurisdiction relative to the adjustment and distribution of successions. The reasons advanced, and the laws referred to in those judgments being altogether applicable to the present cause, we refer to them as the principal basis of our opinion now to be expressed. See 12 *Martin*, 229, 358, 361.

The semblance of difference which exists, is, that in the present case application was made to the district court to order a meeting of the creditors of Greffin's succession, for the purpose of having syndics appointed to assume its administration as being insolvent. In their petition for that purpose, the plaintiffs make Debon the testamentary executor a party defendant, who made opposition to the order granted for a meeting of said creditors, and succeeded in having it set aside, on the ground of the want of jurisdiction in the court

to which they applied, and from this decree declining jurisdiction they appealed.

Previous to the final decision of the cause in the court below, certain persons stating themselves to be heirs of the testator, intervened and gave their assent that a forced surrender of their ancestor's estate might take place as claimed by the original petitioners. The same persons had before claimed as heirs in the court of probates, and prayed the executors to be compelled to account with them for said estate; and in that suit their capacity as such seems to have been recognised.

The points assumed by the counsel for the appellants in opposition to the judgment of the district court are. 1st, That the court of probates has no longer exclusive jurisdiction of the matters now in dispute, in consequence of the homologation of the executor's account. 2d. That his functions having ceased, he ought not to be heard in opposition to the plaintiffs, as the real party interested, the beneficiary heirs, consent to have the testator's estate administered by syndics on a forced surrender.

We have already shown that all jurisdic-

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tion in relation to successions belongs by law exclusively to our courts of probates. This extends to all decrees and orders which may be necessary, for the payment of debts and legacies, and the final settlement of an estate. The affairs of successions are administered by the agency of tutors, curators, or testamentary executors, all deriving their authority either substantially or formally through a court of probates, to which they are bound to account for their administration. Beneficiary heirs are held to nearly the same responsibility as curators, when there are creditors of the estate; and after the delay accorded by law to executors, should an estate remain unliquidated, would succeed to their duties and functions in relation thereto. Debon, the executor, being referred to in the petition for a *concurso*, or forced surrender, had a right to make opposition; but whether or not this right ceased by the homologation of his accounts, is here unnecessary to inquire. Admit that the heirs with benefit of inventory have superceded him, and are to be considered the sole administrators of Greffin's succession, they cannot by consent take away from the court of probates its jurisdiction in the

present case. When want of jurisdiction relates to personal rights or privileges of a defendant, it may be cured by consent; but if it relate to the matter in contestation, consent cannot give jurisdiction. We do not believe that there is any principle of our laws, which will authorise a forced surrender of a succession, and transfer its administration to syndics appointed by creditors, in opposition to the jurisdiction and power granted in such cases to our courts of probates, and their officers, such as tutors, curators, &c. Creditors are bound to make their claims before these tribunals; there they must be classed and paid according to rank and privilege.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Seghers for the plaintiffs, *Mazureau* for the defendant.

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BROWN & AL. *vs.* RICHARDSONS.

JOHN BROWN & CO. vs. *RICHARDSONS.*

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The petitioners aver that Wm. Anthon Richardson, Wade Richardson, John G. Richardson, Jared Richardson, and James Richardson, residents of the state of Mississippi, are indebted to them in the sum of $2630 $\frac{00}{100}$ for this, that Joseph Fuqua and Wade Richardson, trading under the firm of Fuqua & Richardson, made their promissory note for that amount in favor of Francis Richardson, deceased, who being indebted to the petitioners, endorsed it to them. That they presented it to the drawers, who refused payment, and that they caused it to be protested, and due notice thereof given to the endorser and his representatives. In consequence of which they state that the persons above named, who are heirs of Francis Richardson, have become liable to them for the note thus endorsed by their ancestor, and more particularly so, as they have received property of his estate to a larger amount than that now claimed of them.

The petition concludes by stating, that the parties above named reside permanently out

It is not sufficient that the facts necessary to be stated in a petition, to create responsibility in one character, establish liability in another to authorise the conclusion that the defendant was sued in both.

Contracts should be expounded according to the laws of the country where they are made, and enforced according to the regulations which prevail where the debtor is found.

If the property of the estate of a person who has died abroad comes into this state after his decease, it cannot be attached. It must be represented by a curator.

If the defendant sued in one capacity suffers an inquiry to be gone into to establish responsibility in another, judg-

of the state, but that they have credits and effects in the hands of —— Debuys & —— Longer, and prays that the property of all the said defendants, or any of them, within the jurisdiction of the court, may be attached to an amount sufficient to satisfy the claim, with interest and costs.

ment will be given in pursuance to the proof adduced.

An attachment issued as prayed for, and the sheriff returned that he had attached in the hands of the garnishees, the goods and chattles, lands and tenements, credits, &c. of the defendants, to satisfy the demand contained in the petition.

Two of the defendants, viz. Wm. A. Richardson and John G. Richardson, released the property attached, which belonged to them, and gave bond with security, conditioned as the law directs.

The attorney appointed by the court to defend the rights of the parties, non-residents, filed an answer in which he stated, that under the authority conferred on him by the appointment of the court; he denied the allegations contained in the petition, and pleaded specially—1st, that the note was made in the state of Mississippi, where the ancestor of the defendant's resided and died, and that the

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plaintiffs' remedy was against his executor. 2d, that the heirs of Francis Richardson were eight in number, and that if they were held to be responsible, it could only be each for his part.

One of the defendants, Wade Richardson, is a partner in the house of Fuqua & Richardson, who are the makers of the note, and as he is heir to Francis Richardson, who is endorser, it has been made a question in this case, whether the petition, the material averments of which we have just recited, does not charge him as maker, as well as heir to the endorser. We are clearly satisfied it does not. It is not sufficient, that the facts necessary to be stated, to create responsibility in one character, establish liability in another, to authorise this court to conclude that therefore the defendant was sued in both. Every thing in a petition should be plain and perspicuous, and the party sued ought to be clearly instructed why he is sought to be condemned, not left to infer it from doubtful and obscure allegations.

The next question is, which of the parties named are regularly before the court. It has been contended that only two of them, W. A.

and J. G. Richardson, have been made defendants. On recurring to the petition we find, however, that three other persons are sued with the two just named, and the sheriff returns that he has levied the writ of attachment on the property of the *defendants*. There is nothing in the record which proves this untrue. It is indeed stated that two of the parties replevied certain credits and a quantity of cotton belonging to them, which had been attached; but this the plaintiffs contend, and we think correctly, does not prove that the objects released were necessarily every thing which had been levied on. And even if the bond did state explicitly, that all the property seized had been given up, it would not be sufficient to disprove the sheriff's return. For, in order that the evidence should have that effect, it ought to have been given contradictorily with the opposite party. The admissions of the counsel in respect to the bond, are confined to an approbation of the security—his previous assent is given to the property being delivered up to the defendants.

The next inquiry which the case presents is, as to the liability of the defendants. The contract on which they are sued was made at

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Woodville, in the state of Mississippi; their father died there, leaving executors charged with the settlement of his estate, and payment of his debts; and it is insisted that, according to the laws of that country, the heir is not responsible for the simple contract debts of his ancestor.

The counsel have agreed that the common law and statutes of England, up to the year 1776, form the rule of action in that state, except so far as they are changed by its legislative enactments.

At common law the heir was not bound by the contract of his ancestor, unless expressly named in it, *Bacon's Ab.* 3, 459—*heir and ancestor.* We do not find any thing in the laws of Mississippi, which alters or affects this principle, or which makes him responsible. What relief a court of equity in that state would afford to a creditor, on a contract made in another country, against the heir, who (after the payment of all the supposed debts of the estate by the executor) had received the residuary portion, we do not know. But on such proof as has been given in this case, the defendants could not even be pursued before that tribunal; for the executors swear that

they have in their hands, and intend to hold, funds to an amount sufficient to pay the claim of Brown & Co.

We recognise the distinction made by the plaintiffs' counsel between the right and the remedy, and agree with him that contracts should be expounded according to the laws of the country where they are made, and enforced according to the regulations which prevail where the debtor is found. It is that distinction which gives the defendants immunity in this case. For in order to ascertain who is debtor, we must recur to the laws of the country where the contract was made; and if these laws do not make persons standing in the character of the appellants liable, under the circumstances now in proof, they cannot be made so by a change of jurisdiction. It is true, that according to our jurisprudence, the heir is obliged to pay the debts of the ancestor, if he accepts the succession unconditionally; but it does not follow that the same rule exists in other countries. An embarrassment is created in considering the case, from a feeling which it is difficult to check, that there exists something like a natural obligation on the child to pay the parents debts—particu-

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larly if he takes any of his property. But that obligation is in fact nothing but the creature of positive law, and is of course subject to all the modifications which the policy of different states may induce them to adopt.

But it is contended that the heirs are only sued here as the means of getting at the property of their ancestor. To this argument we think the reply of the defendants' counsel is satisfactory. If Richardson, who died in the state of Mississippi, has property in Louisiana, and his heirs live out of its limits, the succession is a vacant one, and a curator should be appointed for it—*M'Kenzie* vs. *Havard*, 12 *Martin*, 101.

The last point is the liability of one of the defendants as drawer, and we are of opinion that the district court did not err in giving judgment against him in that capacity. He is proved to be the maker; and although, as we have already seen, the petition was not sufficiently explicit to allow us to say that the defendant was apprised of being sued in that character; yet, as it appears an investigation was gone into in the court of the first instance in relation to his responsibility, as such, and as the evidence taken establishes that respon-

sibility, we think the plaintiffs should recover. If the testimony had been introduced, as it is urged it was, merely for the purpose of making out the plaintiffs' demand, as they thought fit to alledge it in the petition, there would be much weight in the argument used, to distinguish this case from those already decided on this head. But the proof taken here, was to establish a right to recover in another capacity—2 *Phillips' Ev.* 18; *Langlini* vs. *Broussard*, 12 *Martin*, 18.

The investigation we have gone into, as to the rights of all the defendants, expresses our opinion on an objection made that only two of them had appealed. On the whole, we think that the judgment of the district court should be annulled, avoided and reversed: and proceeding to give such judgment as in our opinion ought to have been rendered in that court; it is ordered, adjudged and decreed, that the plaintiffs do recover of the defendant, Wade Richardson, the sum of two thousand six hundred and thirty dollars, 95 cents, with interest on the said sum at eight per cent. from the 22d March, 1822, until paid, and costs of suit. And by reason of the gar-

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nishees, —— Debuys & —— Longer, having failed to answer the interrogatories propounded them, it is decreed that they pay the amount of this judgment, or in failure thereof that execution issue thereon against them according to law.

It is further ordered, adjudged and decreed, that there be judgment for the other defendants against the plaintiffs, as in a case of nonsuit.

Eustis for the plaintiffs, *Hoffman* for the defendants.

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If the garnishees surrender all the property attached they are not obliged to answer interrogatories.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. We granted a re-hearing in this case from a doubt whether the facts as proved in evidence, authorised the application of the principle of law on which the liability of the defendant was decreed. The question has now been very fully gone into, and the counsel for the garnishees has also been heard in opposition to the judgment of the court so far as it affected them.

As it respects the defendant, we are satisfied no error was committed, if it should be found he was regularly before the court. He was sued as heir and endorser, and an investigation of his responsibility in his own right and as drawer, was gone into on the trial without opposition. This brings the case completely within the provision of the Spanish law on which we have already acted, in the cases of *Canfield* vs. *M'Laughlin*, *Bryant & wife* vs. *Moore's heirs*, *and Langlini & wife* vs. *Broustand*. 9 *Martin* 303; 11 *ib.* 26; 12 *ib.* 244.

The garnishees having failed to answer the interrogatories propounded to them by the plaintiff, we directed in pursuance of the act of 1811, (1 *Martin's Dig.* 520.) that they should pay the amount of the judgment, or that in default thereof, execution issue against them. Further reflection, and the argument of counsel have convinced us we should alter this decree, and we hasten to do so.

The attachment was served on the 15th of March, by law the garnishees had ten days to answer the interrogatories propounded them. Before the expiration of that period, however, two of the defendants applied to the court, and by consent of the plaintiff, obtained an order

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that the property attached in the case, be delivered up to the defendants, on their giving bond and security pursuant to law.

It has been contended that this is only a release of the propety of two of the defendants, and that to give the words used any other construction, would be to contradict the sheriff's return, which states that he had levied generally on the property of the defendants. So we thought on the first argument of the case. The order of court does not however contradict the sheriff's return—it does not direct the property attached which belonged to two of the defendants to be given up, but the property attached in the case, to be given up to them. This necessarily means the whole property, any thing less would not be the property levied on, but a part of it.

That the garnishees had notice of the order and that the property attached was released, there can be no doubt. The bond given to the plaintiff in consequence thereof, is on record, and the approval of the plaintiff to the sureties furnished, is proved. Acting thus in obedience to a mandate, directing them to surrender the property attached, they were not obliged to answer interrogatories; for if

they gave up all, they were no longer garnishees. They could not answer what was in their possession when the parties to the suit had taken it out of their hands.

We are not to be understood to say that even after a proceeding of this kind, the plaintiff might not still prove either by the oath of the garnishees, or otherwise, that they had not complied with the order to give up the effects held by them. But if responsibility was sought to be attached to them on that ground, it should have been suggested; they should have been notified; and an opportunity given them to contest it.

It has been urged that the evidence shows the garnishees did not surrender the property attached. We are not prepared to say so, but it certainly leaves the fact doubtful, and we shall therefore direct the cause to be remanded for further proceedings. The judgment formerly given must be modified accordingly.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided, and reversed; and it is further ordered, adjudged, and decreed, that the case be remanded to the district court to

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be proceeded in according to law, and that the appellee pay the costs of this appeal.

Eustis for the plaintiffs, *Hoffman* for the defendants, *Livingston* for the garnishees.

CRAWFORD vs. *LOUISIANA STATE BANK.*

An agent may show want of funds in the drawee's hands to excuse his neglect of giving notice.

An agent who receives a bill to present for acceptance or collection is bound to use the same diligence in giving notice as the holder.

And if he neglects to give notice, the *onus* of showing there was no damage is thrown on the agent.

APPEAL from the court of the first district.

MATHEWS J. delivered the opinion of the court. This case comes up on several bills of exceptions taken on opinions of the judge of in the court below, on points of law, which if they be pertinent to the issue between the parties, and the judge has erred in said opinions, will require that the cause be remanded.

The plaintiff claims a remuneration in damages from the Bank, on account of misconduct and negligence of its officers, in relation to a bill of exchange, drawn in his favour by Crawford & Bernard of St. Francisville, on J. Clay of New-Orleans, and sent by said plaintiff to the defendants, to be presented for acceptance, and collected when due. In addition to the general allegation of negligence,

the petition contains averments of special injury sustained by the payee of the bill, in consequence of having surrendered to the drawers certain property which he held as security for its payment; and that this surrender was made under a belief that the bill had been accepted by the drawer, derived from information received by him to that purport from the Cashier of the Bank. The subsequent insolvency or failure of the drawers is also stated.

The answer contains a denial of negligence, that the payee knew at the time of taking said bill that the drawers had no funds in the hands of the drawee, and that he has suffered no damage by its not being accepted by said drawee, &c.

It appears by the record that the cause was submitted to a jury on the issues arising out of the petition and answer, without specifying particular facts to be found. After hearing such evidence as was offered, they found a general verdict for the defendants, and judgment being thereon rendered, the plaintiff appealed, and brings up the cause as above stated.

The first exception taken, is to the propriety of admitting evidence on the part of the de-

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fendants, to show that the drawers of the bill had no funds in the hands of the drawee. The second is to the judge's charge to the jury on the law as applicable to the case. As to the first of these exceptions we are of opinion that the judge *a quo*, did not err in admitting evidence to prove want of funds in the drawee's hands; for this is a fact which may sometimes excuse laches on the part of the holder of a bill, in relation to the liability of anterior parties. See *Chitty on Bills, Am. ed. of* 1822, *p.* 207. And if it will excuse a holder, we can see no good reason why it should not be urged as a means of defence by an agent of such holder who is charged with negligence in the performance of his trust, to show that no damage has been occasioned by his conduct.

The counsel for the plaintiff prayed the judge below, to direct the jury, that a holder of a bill for collection, and having no other interest in the bill than as agent for the purpose of presenting said bill for acceptance and payment, is bound to use the same diligence in giving notice of non-acceptance, as is required of a holder who has discounted or purchased a bill. And also, that the law presumed that the anterior parties sustained da-

mage by an omission to give notice of non-acceptance, and that the *onus probandi*, was on the holder to show that no damage had been sustained.

The first of these principles of law on which the judge refused to instruct the jury as being sound and obligatory, depends much for its validity on the doctrines of agency; and seems to us, to recognize a fundamental rule on that subject, which requires ordinary care and diligence on the part of a mandatory, or such as men of common prudence bestow on their own affairs. We have no doubt of its correctness taken abstractedly: neither have we of the correctness of the second point pressed by the plaintiff's counsel. See authority above cited, p. 208 & 258. But an important difficulty here arises. Are they pertinent to the issue as made up by the pleading in this case? If they are, as already expressed, the cause must be remanded.

It is true (as we think) that the evidence offered to the jury does not support all the plaintiff's allegations; and according to the state of the case as made out by the evidence and pleadings, perhaps the judge below did not err in the charge which he gave them. But

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the cause being submitted to a jury, they alone were the proper judges of facts, and had the exclusive right of inferring them from the evidence offered on the issue to be decided. This court on an appeal in which a cause comes up with all the evidence and facts accompanying it, as required by law, even where a jury has in the first instance found a general verdict, may inquire into both the facts and law of the case, and affirm or reverse the judgment of an inferior tribunal, as justice may require. But when a case is brought before us on bills of exceptions alone, taken to opinions on points of law, we can only inquire into their pertinence to the issue as it appears by the pleadings. As we believe those urged by the plaintiff's counsel to be both sound in the abstract, and pertinent and applicable to the present cause, we are of opinion that the judge of the district court ought to have thus directed the jury; and if in his opinion they were inapplicable to the case as made out by proof, to have so expressed his opinion, leaving them free to draw their own inferences and conclusions from all the evidence. It is possible that the jury may have been misled by the refusal to direct them on the points of law as required by the plaintiff's counsel;

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as they may have inferred thereby that anterior parties to a bill of exchange were not presumed by law to have suffered injury by the laches of the holder in not giving notice of non-acceptance or non-payment; but that in every case it is incumbent on the party who wishes to avail himself of the want of notice to prove that he has actually suffered damage by such negligence.

It is therefore ordered, adjudged, and decreed that the judgment of the district court be avoided, reversed and annulled, and that the cause be sent back to said court, there to be tried *de novo*, and that the defendants pay the costs of this appeal.

Livermore for the plaintiff, *Duncan* for the defendant.

HONORE vs. *WHITE & AL.*

A suit for a breach of contract made thro' an agent should be brought against the principal for whom the agent contracted.

APPEAL from the court of the parish and city of New-Orleans.

MARTIN, J. delivered the opinion of the court. The plaintiff, as master and part owner of the steam-boat Hecla, claims $2475 67, for freight of a quantity of merchandise, according to an account annexed to the petition. He further

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shows, that the defendants in December, 1818, caused to be shipped on board of the steam-boat Henderson, in New-Orleans, a quantity of merchandise, to be delivered at the mouth of Cumberland river, (according to the bill of lading annexed to the petition) which were landed at Natchez, (the said steam-boat being accidentally disabled from proceeding any further) and delivered to Griswold & Weeks; and the plaintiff, being then in New-Orleans with his boat, desirous of procuring a freight to Louisville, the defendants engaged him to proceed to Natchez, take the goods there left by the Henderson, and carry them to Nashville, for a freight expressed in the bill of lading, annexed to the petition; and gave him an order to receive the said goods at Natchez, from Griswold & Weeks.—That accordingly the plaintiff left room in his boat for these goods, and refused to receive others that were offered him, in sufficient quantity to fill her up, and to be delivered at Louisville, whither he was bound. That he accordingly proceeded to Natchez, and applied to Griswold & Weeks for the aforesaid goods, but they refused delivering them or any part therof; of which he immediately gave notice to the de-

fendants; that, in consequence, he was compelled to proceed with a great part of his boat empty, and lost the freight of a considerable part of her.

The answer denies that the defendants are indebted to the plaintiff in the sum claimed, or any part thereof, in the manner and form alleged—and all the plaintiff's allegations, from, or by reason of which, they might be liable to pay.

There was judgment for the plaintiff, and the defendants appealed.

Gray deposed, that at the time related to in the petition, he was clerk to the plaintiff—master and part owner of the Hecla—that the defendant Chapman (White's partner) came on board, and gave an order for a quantity of goods, about twenty or thirty tons, to be taken in at Natchez and delivered at Louisville or Cumberland river, he does not recollect which. He expected the goods would be delivered on the boat's arrival at Natchez—from what passed between the parties, he felt assured the goods would be delivered—the order he speaks of was delivered by Chapman, but he does not know whether it was given by his or another house. Chapman was very

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anxious that the boat should start on that day. The plaintiff told deponent the defendants would assist in getting freight for the boat. He does not know who advertised her, nor whether the plaintiff paid commission for procuring any freight, but presumes the defendants charged it. He does not know that the plaintiff made any bargain with any body but Chapman for the freight of these goods. The boat proceeded immediately to Natchez; on her arrival, a demand of the goods was made from Reynolds & Weeks, who refused to deliver them, and the plaintiff protested. (The protest was produced and filed.) The deponent thinks they had a letter from the defendants to Griswold & Weeks. He inclosed some papers to them, but he does not recollect whether it was such a letter, or the bill of lading annexed to the petition. The freight was from 24 to $2500; there being twenty or thirty tons. About the time of this transaction an English gentleman offered a number of passengers, who he supposes would have filled the cabin, and mentioned he had also some goods. He thinks that by waiting a few days, the plaintiff might have had as much freight as he was promised at Natchez, and

passengers besides. The plaintiff's father was then in New-Orleans buying goods, which he shipped in the Exchange. He told deponent he would give the boat some freight, and wanted her to wait. The deponent now commands the steam-boat Henry Clay, consigned to the defendants, her agents in New-Orleans. He assisted the plaintiff in getting freight, and generally in doing the business of the Hecla.

In his cross examination, the witness stated that he recognised the bill of lading, annexed to the petition, and that the merchandise mentioned in it, was shipped by Jackson & Reynolds, and he presumes that it was in consequence of the order, endorsed on the bill of lading, and the statement made by Chapman, that the plaintiff was induced to proceed to Natchez for the goods. He believes the defendants have been engaged in procuring freight for the Hecla, as commission merchants.

Jackson deposed that the defendants, in January or February, 1819, as agents for the steam-boat Henderson, engaged from Jackson & Reynolds, the freight mentioned in the bill of lading, annexed to the petition. He understood the goods thus shipped were, ow-

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ing to the disability of the Henderson, left at Natchez. The defendants applied to the deponent to transfer the freight to the Hecla, and make the endorsement on the bill of lading. The freight amounted to $2413 71. When Chapman applied to him for the freight for the Hecla, he considered him as the agent of that boat. He also considered the defendants as agents of the Henderson. He did not understand from the plaintiff, nor any other owner of the Hecla, that they were agents for her. Bowen, the captain, and as he understands a partner of the Henderson, lived in Kentucky.

Reynolds deposed, the defendants had no interest in the goods sent by the Henderson, and were intended to be shipped in the Hecla—they were the agents of the Henderson. This witness having heard Jackson's testimony, confirmed it.

Turner deposed, the plaintiff was introduced to him by White, in his office, as a person who wished his advice. The plaintiff desired to be informed whether the freight procured here, for the goods from Natchez to Cumberland, could be recovered, and from whom? The deponent thought it might, from Jackson and Reynolds. During the pendency of the

suit, he considered the defendants as the plaintiff's agents, and consulted with them as such. They always told him they were the plaintiff's agents in the business. The latter desirous of knowing how the business progressed, spoke to the deponent. It is strongly impressed on his mind that the defendants acted in the capacity of agents of the Hecla, for procuring her freight, when they obtained the order from Jackson & Reynolds—but whether he received this impression from the papers submitted to him, or from the conversation of either or both parties, he cannot say.

The defendants' letter to Griswold & Weeks, by the plaintiff, is in the following words:—We are this moment in receipt of yours, per steam-boat Henderson: the peltries shall have our best attention. We have given captain Honore an order from Messrs. Jackson & Reynolds, of this place, as well as the bill of lading, for the goods they shipped per the Henderson, and deposited in your warehouse: you will therefore deliver to him, taking a bill of lading as the one he has, and forward two to us, as soon as delivered. We remain, &c. M. White & Co. New-Orleans, Feb. 5, 1819.

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White deposed, that the defendants never did own any part of the steam-boat Henderson; nor were they entitled to any commission from her owners, for any freight which they might have caused to be transferred from her to the Hecla.

Had the failure been on the part of the plaintiff—had he neglected to stop at Natchez and call for the goods, which he complains were not deliverd him, there cannot be any doubt that Jackson & Reynolds, whose order for the delivery of them the plaintiff received, would have been entitled to demand damages from him—for the receipt of the order is evidence of his promise to call for and receive these goods. Had the goods been received, the evidence shows bills of lading would have been required, evidenceing a shipment by Jackson & Reynolds. We therefore conclude that they were the principals, whose goods were the object of the convention which took place between the plaintiff and the defendants, and the latter must be considered as agents only, and as agents of Jackson & Reynolds. It appears to us, the counsel consulted by the plaintiff, gave him correct advice.

It is therefore ordered, adjudged and de-

ceed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for defendants, with costs in both courts.

Workman for the plaintiff, *Hoffman* for the defendants.

REYNAUD & SUCKO vs. *GUILLOTTE & BOISFONTAINE.*

Prescription in redhibitory actions runs from the time the defects in the slave are known to the purchaser.

APPEAL from the court of the parish and city of New-Orleans.

PORTER J. The petition sets forth that on the 24th February 1821, the defendants sold to the plaintiff a negro boy named Tommy, about 23 years old, for the sum of $900 and warranted him free from all redhibitory vices and diseases: that at the time of the sale the slave was afflicted with ulcers on his leg, and that the defendants knew it, but made false representations respecting his health; that the said ulcers are of an old standing; and that notwithstanding all the care, trouble and expense, which the petitioners have been put to, the slave is almost entirely unfit for the work and labour for which he was destined;

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and finally, that the use of said slave is rendered so inconvenient for them, that had they been informed of his true situation, they would not have bought him.

The answer avers, that the negro at the time of the sale was not afflicted with ulcers; that if he was, the sale cannot be rescinded; and that owing to the want of care in the plaintiffs, the slave has been injured in value to the amount of $500. With leave of the court the plea of prescription was afterwards added.

The cause was submitted to a jury, who found for the defendants. A new trial was granted, and the parties consented to waive the jury and submit the case to the court. The judge decided that the sale should be rescinded, and the plaintiffs pay at the rate of $20 per month for the time they used the slave not knowing of his defects. The defendant appealed.

The first question to be decided is the plea of prescription. The action was commenced nine months and twenty-four days after the date of the sale.

Dr. Ker, a witness on the part of the plaintiff, swear that he went to visit the negro on

the 30th March, and left off attendance the 25th May; that when he first saw him the disease appeared of long standing, which, if healed speedily, would soon break out again, and that he told the plaintiff so when he desisted from visiting the slave.

Dr. Chabert deposed that he went to visit the negro on the last days of October, and he ceased to see him at the close of December; that when first called in, the plaintiff did not appear to be aware of the extent of the disease, and asked if it was curable; he thinks there is little hope of its being cured.

It is the duty of the buyer, who brings his action after six months have elapsed, to prove when the knowledge of the defects of the slave was acquired by him. A question arises out of the evidence in this case, whether the prescription runs from the time the disease was known to exist, or from the time it was ascertained to be such as would form the ground of redhibition. We think from the latter, for until the purchaser was instructed that he had a right of action, he was not in delay by not bringing it. He cannot be accused of negligence while the nature of the disease was unknown to him, and he was con-

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ferring a benefit on the vendor, by attempting to cure it. In the case of *Theard* vs. *Chrétien*, we said that if the plaintiff had proved any circumstance respecting the time when he acquired a knowledge of the vice, we should have held it sufficient to throw the burthen of proof on the seller, to show that he knew it earlier. In that now before us it is proved by one of the witnesses that the plaintiff did not seem aware that the disease was incurable in the month of October, and up to the 31st July the negro was not prevented, by sickness, from working. So that whether we take as the basis of this action the slave being afflicted with an incurable disease, or having one which, though not incurable, was known to the vendor at the time of the sale, and rendered his services so difficult and interrupted, that if the purchaser had been aware of its existence, he would not have made the acquisition—the plea of prescription must be rejected.

The disposing of this question brings us to the merits. On the ground of the disease being incurable, we have the testimony of two physicians. The first attended the slave two months and was unable to cure him; he considers the disease as one of those which it

it would be difficult to heal, or if healed speedily, that it would break out again. The evidence of Dr. Chabert is more explicit; he states that he is certain the ulcers are more than a year old; he describes the disease with exactness, and details what he conceives would be the best method of effecting a cure, and finishes by declaring that there is little hope of the disease being removed.—(*peu d'espoir de guérison.*)

On that of the disease being known to the vendor, and that it is such as to render the services of the slave so difficult, and interrupted, that if the purchaser had known it he would not have bought. *Fouchet*, deposes that since the plaintiff purchased the slave he has been sick two months. *Lemager* states that he has been sick several times, sometimes for fifteen days, and sometimes for a month at a time, during which periods he was entirely prevented from doing any work. There is none of the witnesses who prove in direct terms that the vendor knew of the existence of the defect in the slave at the time he sold him. The proof on that head is the testimony of the medical persons, who state that the ulcers were of long standing. Opposed, however, to their evi-

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dence we have the testimony of one witness introduced by the plaintiff, who swears that he knew the negro about a year before the sale, and that he was in good health then. And Dr. Thomas, deposes that about five months before the date of the sale, he attended the slave for a venereal affection, and cured him perfectly.

This evidence, though going far to show that the disease is incurable, does not completely establish it. The first physician expresses no positive opinion—the declaration that the sores would be difficult to heal, implies that it is possible they may be. And, the second, although he seems to have a more decided conclusion formed in his mind, does not pronounce the slave to be incurable; he says the nature of the disease leaves little hope that it can be cured.

Neither does the evidence prove that the disease was known to the vendor previous to the sale. The physicians, it is true, declared that the disease must have existed at and before the date of sale, but it is too much to infer knowledge in the vendor from this circumstance, particularly when we are informed that for six months after the slave was pur-

chased he was not prevented from working. It is believed that slaves are often afflicted with ailments unknown to their masters, and though the testimony does certainly raise a presumption that this owner might have known the disease, still it is not sufficiently strong to enable such conclusion to be confidently drawn.

The judgment of the parish court should be annulled, avoided, and reversed, and judgment be for the defendants, with costs in both courts.

MARTIN, J. I concur in the opinion of Judge Porter, as to the plea of prescription.

On the question of fact, the incurability of the slave's sores, I think the decision of the first judge ought not to be disturbed. He heard the witnesses' testimony from their own mouths, and had the opportunity of interrogating them; and I believe that independently of this circumstance, my mind would have come to the same conclusion.

Two physicians have been examined; Dr. Kerr informs us that when he first saw the slave, the disease appeared to have been of long standing, and one of those which, if healed speedily, would soon break out again; this

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implies his belief perhaps, that if the proper length of time was taken to heal the sores, they would not break out again. But this was his first impression, and when, after two months attendance he discontinued his visits, he appears to have been of a different opinion; for he told the owner, he thought the disease would be difficult to heal, and if healed at all, would break out again.

Hence I conclude, he thought no radical cure could be effected. It is true he swears that he told the owner he thought the disease difficult to cure, &c. without swearing he actually thought so. But physicians, like all other professional men, have duties incident on their profession, which they cannot, without reason, be presumed to disregard. Dr. Kerr could not tell to his employers that he thought the disease difficult of cure, &c. if he did not really think it such, without being guilty of very gross prevarication, and the idea of so base a dereliction of duty cannot find admittance in my mind.

Impressed then with the opinion that one of the two doctors, on whose testimony I am to base my judgment, was that the disease was difficult to heal, but if it yielded to the medi-

cal art, so far that the sores might be healed, the sores would break out again—that the other, Dr. Chabert, entertained but little hopes of a cure; I cannot conclude that the parish judge drew an illogical conclusion from the testimony, when he held that the incurability of the disease was satisfactorily proven. The medical science is one of conjecture, and the conjectures of the professors of it, must by a magistrate not conversant in it, be taken as approximating more to the truth, than those which he himself can form.

A circumstance appears to militate against the decision of the parish judge. The case was first tried by a jury, who found a verdict for the defendant. I can give but very little weight to it; we have not the evidence which was before the jury; and it is not clear, at least to me, that with that on which the parish judge pronounced, they would have given the same verdict.

I think we ought to affirm the judgment of the parish court.

MATHEWS, J. The concurrence in opinion, of the two judges who precede me in the decision of this cause, in relation to the plea of

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prescription made by the defendants, precludes the necessity of further inquiry on that part of the case.

This is a redhibitory action, and the principal facts alleged and attempted to be proved by the plaintiff in its support, are an incurable disease, with which the slave sold to him was afflicted at the time of the sale, and that the defendant knew the existence of said disease. Other diseases and infirmities, except those expressly named in our code, constitute redhibitory defects, when they are incurable, and render the slave, subject thereto, unfit for service, or render his services difficult, inconvenient, and interrupted. Even a curable disease may form a redhibitory defect, when it is proved that the seller was acquainted with said defect, before the sale or at the time it was made.

The evidence in the present case does not, in express or positive terms, prove either that the disease was incurable, or that its existence was known to the seller at the time of sale: but I am inclined to believe that it may be fairly inferred from the testimony of the physicians, that the sores on the negro's leg are of long duration and incurable; and also from

other testimony in the cause, that the defendants had knowledge of their existence. Should I admit the probability of coming to other conclusions than those drawn by the parish court on the facts of the cause as proven, still I am not so clearly convinced that any error has been therein committed, as to give my assent to reverse the judgment, and therefore concur with judge Martin.

Denis for the plaintiffs, *Grima* for the defendants.

GILLY vs. *LEE.*

APPEAL from the court of the first district.

An assignee by an act *sous seing privé* cannot obtain an order of seizure and sale.

MATHEWS, J. delivered the opinion of the court. In this case, the plaintiff sues as surviving partner of the late firm of Gilly & Prior, and founds his action on a judgment alleged to have been obtained by the United States against Lewis & Lee, principals, and Gilly & Prior, sureties, on a custom house bond, &c.

He states in the petition that the judgment was paid and satisfied by said sureties, and in consequence thereof, they are subrogated to all the rights and claims of the United States;

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that the defendant has acquired property since the failure of the house of Lewis & Lee, which ought to be subjected to the payment and refunding of the amount thus advanced by the firm of Gilly & Prior for the use and benefit of said Lewis & Lee. He also claims a mortgage and privilege, resulting from said judgment; and prayed an order of seizure and sale of the defendant's property, which was granted by the district court in the first instance, but afterwards annulled and set aside by a subsequent decree; and from this latter order and decree the plaintiff appealed.

Being of opinion that the appellant's claim is not supported by evidence, sufficient to entitle him to the prompt and extraordinary remedy of seizure and sale; we deem it unnecessary to investigate the various means of defence offered by the defendant's counsel. Admitting that sureties who pay for their principals, are by law subrogated to the rights of the creditor, these rights take effect only by evidence of such payment having been properly made; and that exclusively for the benefit of the principal debtors; it is the payment that gives them the rights of the creditor. Should we even further admit that a

state court could in any case execute a judgment rendered in a court of the United States, (which to say the best of it is very doubtful,) still a party claiming the benefit of such execution, by subrogation to the rights of the original judgment creditor, must establish every fact in support of his claim by authentic evidence, as required by our laws. A plaintiff who applies for the administration of justice in an extraordinary and summary mode, must bring himself completely with the rules which authorise such a proceeding. In the present case the fact of payment does not appear by any authentic document or record; the evidence of it is a simple receipt given by the late marshal of the district, to Gilly & Prior, against their bond, without naming them as sureties, and without reference to any judgment which had been obtained on said bond. It is matter *in pais;* and before any legal process could be had on it, ought to be established contradictorily with the defendant in an ordinary suit. See 10 *Martin*, 223.

The counsel for the plaintiff seemed to rely much on a doctrine found in the *Curia Phil.* 118, *no.* 9, in which it is said that a surety, who has paid for his principal, may pursue him

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for the amount thus paid, *aunque sea executivamente.* But this, as it appears by the same authority, which refers to a law of the recopilation, can regularly take place only when both the debt and payment are evidenced by a public and authentic instrument. Whatever effect the judgment referred, to in the plaintiff's petition, might in itself produce in favor of the United States as being public and authentic, it cannot favor the pretensions of the appellant; for his right depends on the payment and satisfaction of said judgment by his firm as sureties, in the bond referred to; and this fact is not established by any authentic document.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Duncan for the plaintiff, *Grymes* for the defendant.

ABAT vs. *MICHEL.*

The order given at the beginning of proceedings to obtain a respite, ceases with the granting of it.

APPEAL from the court of the first district.

MARTIN, J. delivered the opinion of the court. The defendant sued on his note of

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The judgment of homologation is not complete, without being signed by the judge.

hand, pleaded that the court has no jurisdiction to take cognizance of the suit, for this; that the defendant on the — day of —, in the last year, filed his schedule before the parish court, praying for a respite, and that the same has been legally granted by three-fourths of his creditors, in sum and number, and the plaintiff made no opposition to the same, although his debt was stated in the schedule—and he pleaded the respite duly homologated in bar.

There was judgment for the plaintiff, and the defendant appealed.

We notice two pleas, one in abatement, the other in bar. The first is grounded on the assertion that a respite was legally granted to the defendant. If that be true, (and the defendant cannot complain, if we take his assertion for the truth) the order for staying all proceedings against his person and property, ordinarily granted at the beginning of proceedings to procure a respite, must have ceased with the granting of the respite.

The plea in bar is grounded on the due homologation of these proceedings, which, in the opinion of the defendant, renders the respite granted by the three-fourths of the creditors

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binding on the rest, and among them the plaintiff. The record shows, however, that at the time of the plea, and of the judgment appealed from, no such due homologation had been obtained; the signature of the judge to the judgment of homologation being posterior to the arrival of the record in this court.

The district judge was therefore correct in overruling the plea in abatement, because it contains no allegation that a stay of proceedings had been obtained, and it contains a fact inconsistent with the continuation of such a stay.

The plea in bar was also correctly overruled, because no complete judgment of homologation was shown; none did exist.

We cannot take notice of the effect of the judgment, after the judge's signature was apposed to it, because this is a new question arising on a new fact, and in passing on it we would not review the jugdement of another court, but pronounce an original one.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

Morse for the plaintiff, *Denis* for the defendant.

LAFON'S EXECUTRIX vs. *GRAVIER & AL.*

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LAFON'S EX'TX *vs.* GRAVIER & AL

APPEAL from the court of probates.

PORTER, J. delivered the opinion of the court. This action was commenced by Pierre Lafon, who has deceased during its pendency. It has been revived and carried on in the name of his heir and executrix.

The petitioner stated that he was instituted by the last will and testament of his brother, the late B. Lafon, his sole and universal heir; that the defendants, though the period given by law for the gestion of the affairs of the estate had expired, refuse to render their account as executors, and are about to sell a portion of the property of the succession to his great injury. He prays an injunction against the sale; that he may be admitted to establish his quality as heir; that the defendants should be ordered to account; that they be prohibited from any further administration of the estate, as their capacity of executors had ceased; and that they be decreed to surrender up all property in their hands.

The defendants pleaded the general issue. That the petitioner is not the Pierre Lafon instituted as heir in the will of B. Lafon, or if

A continuance should never be granted on an allegation of a want of testimony, unless its materiality is shown, diligence to procure it, and the expectation that it will be had.

A witness is not incompetent, because he is in the service of one of the parties and receives a salary, nor because he may receive some benefit from the trial.

If the party who has a right to resist the introduction of parol testimony, introduces it himself, he cannot afterwards object to the evidence which it furnishes.

Oral proof may be introduced to establish the identity of a person who sues as the heir instituted in a testament.

Ambiguity arising from matter *dehors* the instrument may

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be explained by parol testimony.

An executor cannot, because he has been unable to liquidate the estate within a year, refuse to give it up to the heir after the expiration of that time.

He may retain it for a longer time if he is so authorized by the will.

But cannot refuse to render an account at the end of the year.

An injunction cannot be granted unless bond and security is given.

he be, he is barred from demanding any account, because in the month of November then last past, he unlawfully, and forcibly took away all the books, titles, and papers, belonging to the estate, and also those necessary to establish the credits to which the executors are entitled.

That there is another suit pending between the parties, in which the present defendants have sued the plaintiff in regard to the papers forcibly taken by them, and that this case cannot be decided until that is concluded.

That the year and the day allowed them by law to settle the affairs of the succession had not expired.

And that the injunction was wrongfully granted, inasmuch as the character of the heir at whose suit it issued is in contestation.

The court below gave judgment, recognizing the plaintiff, as the heir instituted in the testament, and directing the defendants to account. They appealed.

There were several bills of exceptions taken on the trial. The first was to the court proceeding to try the cause, although a commission had issued to take the testimony of a witness residing in the parish of Plaquemine.

The facts necessary to a proper understanding of this decision, so far as we can gather them from the record, are, that the cause was fixed for trial on the 4th of January, and that the trial commenced on that day; that on the 23d of the same month, the counsel for defendants moved for a commission to take testimony returnable on the 1st of February; that on the 8th, the cause was called, and the examination of proof again gone into, and that the defendants then moved that the trial might be postponed until the return of the dedimus. These facts do not enable us to say the court erred. For, admitting that the defendants were hurried, (though the progress of the trial, and the circumstances attendant on it, do certainly exclude any such idea,) still that is not enough to authorize us to conclude the continuance was improperly refused. Courts should never postpone a trial on an allegation of a want of testimony, unless its materiality is shown by affidavit or otherwise, the exercise of diligence to procure it, and the expectation that it will be had. The first and last of these requisites were not shown, and the second is very doubtful. In the case of *Rousseau* vs. *Henderson*, we held that a continuance

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could not be granted after the trial had been gone into, and evidence heard. 12 *Martin*, 636.

The second, was to the admission of a witness named Peyre, on the ground that he was interested. We think it unsupported. The witness swears that he has no interest in the event of the suit, and the facts drawn from him on cross examination, and disclosed by other witnesses, do not contradict his assertion. The circumstance of a person offered to testify being in the service of one of the parties, and receiving a salary, is not of itself a cause of exclusion, although it may according to circumstances affect his credit. Nor is it an objection to the competence of a witness, that he may have wishes, or a strong bias on the subject matter of a suit, or that he may expect some benefit from the result of the trial. Such circumstances may influence his mind, and diminish the confidence which would otherwise be placed in his declarations, but they do not disqualify him from testifying. *Phillips on Ev.* 39, *Am. ed.* 1820.

The third bill of exceptions was taken to the decision of the court permitting parol testimony, to establish the death of Pierre Lafon the father of the testator, and to prove that

J. Pierre Lafon was the brother mentioned in the will. Upon the correctness of that opinion turns the principal question which the cause presents. In regard, however, to the right of the plaintiff to prove the death of the father by verbal evidence, we have found it unnecessary to form, or express any positive opinion. For, as the witnesses produced by the defendants have been examined by them, and have deposed to that fact; the objection that the loss of the higher evidence must be established, before you can resort to the inferior, does not of course apply.

In respect to that part of the exception, which goes to receiving parol testimony to prove that the plaintiff is the same person mentioned in the will, we have had little or no difficulty. The objection, as taken on the trial, presents the question in too narrow a point of view. If no other evidence was proper on the issue now joined, but written evidence, it is clear that the declarations of witnesses could not be received, without first establishing according to law, the loss of these papers, to the contents of which, they deposed. But this we think quite foreign to the true inquiry. We consider it wholly unnecessary

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for the plaintiff to show that the person named in the will is the brother of the testator, that point he himself has settled by the declaration in the testament, of their fraternity. It is not whether Pierre Lafon, is the brother of B. Lafon, but whether the plaintiff in this cause is the same Pierre Lafon who is instituted heir, of which proof is required. Now, for this purpose, parol evidence is as good as any other; nay it is nine times out of ten the only kind that can be satisfactory. Where a person has died leaving no heirs who are known, the register of births and deaths in countries where such registers are preserved, is perhaps the best evidence that the deceased had heirs, and what are their names. But where these facts are already established, and the question is that of identity alone, the extract from the register affords no information, it is a document which any one might procure.

The judge erred, in admitting as evidence a memorandum or note of certain papers delivered by plaintiff to his lawyers; but as the case is before us on the whole of the evidence, and as this document will not in any respect influence our opinion on the merits, it is unnecessary on this ground to remand the cause.

He did not err in suffering letters and papers, contained in a bundle, which had once been in the hands of the executors, to be read in evidence. If any, which the envelope once contained were wanting, it might furnish a just ground of suspicion that those which were kept back proved something against the interest of the party who offered them, and that little weight was to be given to those produced; but it certainly was no ground for rejecting them entirely.

The settling these questions brings us to the merits.

As in our opinion the parol testimony was properly received to prove that the plaintiff was the person instituted as heir in the last will and testament of the late B. Lafon, the next inquiry is as to its effect; before that inquiry is gone into, it is proper to state that the difficulty which arose in this case, between the petitioner and the executors, proceeded from the father of the deceased having been twice married, and leaving two sons—viz. the appellee, who is called Jean Pierre Lafon, and the other, Pierre Guillaume Lafon; the former being full, and the latter half brother of the

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deceased. The defendants contend that Pierre Guillaume Lafon is the instituted heir.

The evidence taken on the issue, consisting of parol proof and written documents, is voluminous; and it is not in our power to abridge it, and convey clearly, the impression which results from a perusal of the whole. After a very attentive examination of it, we have not the slightest doubt of the correctness of the conclusion to which the court of the first instance came, that it was Jean Pierre Lafon, the brother of the full blood, that the testator instituted his heir. The family correspondence and oral testimony, both establish that he was known as, and called Pierre Lafon—it is proved that the deceased addressed him letters at his residence in France, by that name, and various circumstances go to show that he was more present to the testator's mind, and held a higher place in his affection, than the brother of the half blood. Were the evidence such as to leave the matter doubtful, we should presume that B. Lafon intended to prefer a descendant from the same father and mother, to a relation who had only half the claim to his attachment. But we do not wish to be understood as putting our decision on

that ground; for the other evidence preponderates in the scale, into which nature has thrown her weight.

Before we quit this part of the case, we think proper to remark that the defendants' objection against parol evidence being received, because there is no ambiguity on the face *of* the will, has been considered by us, and agreeing fully with them as to the fact, we can by no means accede to the conclusion they have drawn from it. It is precisely because the ambiguity does not appear on the face of the will, but arises from matter *dehors* that instrument, that we think the evidence was properly received. The books of evidence divide ambiguities into two kinds; the one is called *ambiguitas latens*; the other, *ambiguitas patens*. The first is explained to be that which arises from some collateral matter, out of the instrument, and all the authorities admit it may be explained by parol testimony. The illustration of this rule given in *Phillips' Evidence*, is almost the very case now under consideration. *Phillips on Ev.* (*ed.* 1820) 468.

Nor have we overlooked the law of the *Partidas*, relied on by the appellants that the institution of the heir should be certain. Of

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this there is no doubt, but *id certum est, quod certum reddi potest*, and we cannot say that the instituion is void, by reason of the greater or less difficulty, we have in arriving to that certainty. If we adopted the construction which the appellants seem to consider the sound one, nothing more would be required to annul the institution of heir in a will, than raising a contest on the certainty of the person named as such.

The defendants next object that the year and the day given by law to executors to settle the estate confided to them, had not expired when the suit was brought. On this head the evidence shows, that Gravier took out letters testamentary on the 2d October, 1820, Poumairat on the 20th February, 1821, and that the action was not commenced until the 30th day of May of the next year. The appellants contend that they did not get possession of the estate until the 6th April, and that they had many difficulties, arising from the confused state in which they found the succession, to encounter; so that they have not been able to bring it to a close. This may be; but it is our opinion that in an ordinary case, the circumstance of an executor having

suits to bring repecting portions of the property, and meeting with difficulties in liquidating the claims of the estate, does not authorize him to retain possession from the heir for a longer period than one year. *Civil Code*, 166, 224.

But the appellants urge that, however the doctrine may be, in regard to cases where the testator has appointed no particular time for the executor to discharge the duties required of him in the will, it is different where, as in the present case, an indefinite period is assigned him. In support of this exception, they rely on the testament, in which the testator declares that it is his desire, his executors shall fulfil all the directions of his will, and liquidate entirely his succession, and therefore he extends the year of their executorship, as long as it may be necessary to accomplish these objects. We agree with the appellants that these directions must be obeyed, and that the appellee who takes under the will, can take in no other manner but that which this instrument points out. *Febrero*, 1, *chap.* 1, *sec.* 6, *no.* 96. *Par.* 6, *tit.* 2, *l.* 5. But the difficulty here is in ascertaing what time is necessary, or whether the executors have

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faithfully made use of that which has elapsed since the death of the testator. The evidence furnishes us with no information on that head, and we are therefore unable to act upon it.

The testator having fixed no time for the executors to render their account, and the direction of the law being imperative that they shall do it in a year, we think the court below did not err in directing them to render it. It is a satisfaction which the heir has a right to require in any case, and will be particularly useful in this, since it will greatly aid the court in the investigation it will have to make into the right of the executors to retain the estate any longer in their hands.

And we are of opinion that they cannot be dispensed with rendering this account, upon an allegation that the plaintiff has taken certain papers from them, unless they show specifically what these papers are. Besides, on rendering their account in the court below, if they can prove that papers material to their defence, are retained by the heir, he will be compelled to produce them.

The act of the Legislature of 1817, having in positive terms declared, that no injunction shall be granted to deprive any person from

the free disposal or use of the property in his actual possession, without the party applying for it shall give bond and security; we think the judge erred in directing that writ to issue without bond and security.

It is therefore ordered, adjudged, and decreed, that the judgment of the court of probates be annulled, avoided, and reversed, and it is further ordered and decreed, that the plaintiff be admitted heir to Bartholomew Lafon, deceased, that the defendant do account with him as such—that this case be remanded to the court of probates, for the rendition of said account, and in order that such other and further proceedings may be had in the case, as will enable the court to render a final judgment therein. And it is also ordered and decreed, that the injunction granted in the case be dissolved, and that the appellee pay the costs of this appeal.

Moreau-Lislet for the plaintiffs, *Young* for the defendants.

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SEXNANDER vs. FLEMING.

SEXNANDER vs. FLEMING.

APPEAL from the court of the first district.

The exception *de non numeratâ pecuniâ* may be made in case of an authentic act.

MARTIN, J. delivered the opinion of the court. The defendant, sued on an authentic act for the payment of a sum of money, availed himself of the exception *de non numeratâ pecuniâ;* there was judgment for him and the plaintiff appealed.

The appellant's counsel contends that the provisions of the Spanish law, invoked by the appellee, are repealed by our statute, which provides that the authentic act makes full proof of the agreement contained in it, against the contracting parties, their heirs or assigns. *Civil Code*, 304, *art.* 219.

The defendant urges that the exception *de non numeratâ pecuniâ*, (when not renounced) may be made to an authentic act, and throws the burden of the proof for the tradition of the money on the lender. *Part.* 5, 1, 9; *ib.* 3, 18, 70; *Curia Phil. Paga. n.* 30; *Siguenza*, 221, 223; 2 *Febrero* 152, *n.* 163, *ed. of* 1817; 6 *ib.* 297, *n.* 21; *Villadiego*, 47, *n.* 102; 5 *Martin*, 145, *Griffin's ex'r.* vs *Lopez*, *ib.* 593, *Berthole*

vs. *Mace*; 6 *ib.* 524, *Crozet's ex'r.* vs. *Gaudet*; 10 *ib.* 302, *Lepretre & al.* vs. *Sibley*; *Noviss. Recog.* 10, 1, 22.

The exception *de non numeràtâ pecuniâ* does not appear to us repealed by the part of the code, cited by the appellant's counsel, the provisions of which existed under the Roman and Spanish law, which recognized the exception. It does not appear to us that the district judge erred, in sustaining the defendant's plea.

It is said the requiring testimonial proof of that which the party, against whom the proof is to be made, attested under his own hand, is an inconvenient anomaly in those laws, which ought to be abrogated. Let this be admitted; but it cannot be denied that ancient provisions of our laws, which are established or recognized by statutes, and have for ages been respected by courts of justice, cannot be made to disappear or rendered ineffectual by the judiciary power; the constitution has forbidden its interference in such cases, and the legislature is the only competent power to apply a remedy.

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It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed with costs.

Eustis for the plaintiff, *Hennen* for the defendant.

MONTEGUT vs. *DAUPHIN.*

A sheriff cannot recover for keeping slaves unless he shows the expenses incurred

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is an action brought by the plaintiff to recover certain fees as sheriff, and jailor, of the parish of St. John Baptist, for sequestering and keeping certain negroes, as stated in his petition and accounts.

The evidence shows that said negroes were held by him for several months under sequestration, but does not show that he fed them during that time, or was at any expense in their keeping. Should we admit that notwithstanding this deficiency in proof, the appellant is still entitled to his fees as sheriff and detainer of said slaves, it does not appear that the defendant did in any manner cause the sequestration and detention.

It is therefore ordered, adjudged and de-

creed, that the judgment of the district court be affirmed with costs.

Seghers for the plaintiff, *Smith* for the defendant.

LEAKE vs. *BREEDLOVE & AL.*

A bond given on the sueing out of an injunction cannot be cancelled on motion of the obligor.

APPEAL from the court of the third district.

PORTER, J. delivered the opinion of the court. Breedlove, Bradford & Robeson obtained judgment against Leake, and issued execution. He applied for, and obtained an injunction, on the ground that between the time of the rendition of the judgment, and the issuing of the writ of *fieri facias*, he had made certain payments. The injunction after being held up for several terms, was dissolved.

Jos. E. Johnson, the surety on the bond given by Leake to obtain the injunction, moved the district court to cancel the bond, on the ground that the writ had been rightfully sued out, and that the reason for which it was dissolved, proves there was no fault in Leake in obtaining it.

The court went into an examination of the facts, and ordered the bond to be cancelled.

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The defendants filed a bill of exceptions, and appealed.

It is the opinion of the court, that the course pursued by the surety to obtain relief was irregular, and is unsupported by law. Parties, wishing to have their rights investigated in courts of justice, must in all cases begin their action by petition in the ordinary way, unless when the legislature has thought proper to make exceptions to the general rule by express enactment. We see no more right in the maker of this bond, to call by motion on the payee to investigate his right to it, than he would have had in the common case of a promissory note, given on any other consideration, than that of taking out an injunction. From the moment the writ was dissolved, the defendants were out of court, and they could not be legally brought in but by citation.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for defendants, with costs in both courts.

Watts & *Lobdell* for the plaintiff, *Workman* for the defendants.

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vs.
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M'NEILL & AL. vs. GLASS & AL.

APPEAL from the court of the first district.

Goods shipped, cannot be attached after the bill of lading has come into the hands of the consignee.

MARTIN, J. delivered the opinion of the court. A quantity of cotton was shipped by the defendants to Wilkins & Linton for sale, the consignees being greatly in advance to the shippers. On the arrival of the steamboat which brought the cotton, and on the day the bill of lading was delivered to the consignees, the plaintiffs attached it for a debt due to them by the shippers. The claim of the consignees being disallowed in the district court, they appealed.

The ground of the claim is that they are greatly in advance, and made sundry considerable acceptances for the consignees, for which they have a right to be paid out of the proceeds of the cotton.

The evidence shows that the alledged advances and acceptances were made, and that the cotton was attached on the day of the steamboat's arrival in New-Orleans, that the bill of lading reached the consignees in the morning of that day between eight and nine, and before any paper, relating to the attachment, was

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left at their counting house. But it does not appear whether the attachment had then been laid.

The ground on which the district court rejected the claim, viz. "because the attachment was laid before the cotton came into the hands and possession of the claimants," does not appear to us tenable. We are of opinion that a bill of lading confers on the consignee a qualified property in the goods, of which he cannot be divested, either by the consignor or his creditors, without a previous adjustment and satisfaction of his claim.

This case differs but little from that of *Canfield & al.* vs. *M'Laughlin*, 9 *Martin*, 303; and the principle invoked by the claimants, was recognised in that of *Kirkman* vs. *Hamilton*, 5 *id.* 297.

In the case of *Norris* vs. *Mumford*, 4 *Martin*, 20, we held that the vendor's order to his clerk to deliver the thing sold, was not such a delivery of the thing, as would prevent its being seized by the vendor's creditors. But a bill of lading differs widely from an order. In the case of the bill of lading the goods shipped are *de facto et de jure* out of the

possession and control of the consignor, after the bill reaches the hands of the consignee—while, after the delivery of the order, the vendor retains the actual possession and ostensible dominion over the thing sold; and, as a second vendee, deceived by the confidence of the first, may effectually purchase it, the creditors of the vendees may seize it; for they can seize whatever he may sell.

As however the testimony renders very probable indeed, although it does not place beyond doubt, the fact of the bill of lading coming into the claimant's hands before the attachment was laid; a fact which, as we cannot cross-examine witnesses, we cannot obtain. We deem the justice of the case requires that the cause be remanded for a new trial. It is true, parties must in general take care that all the evidence, necessary to support their pretensions, be drawn from the witnesses; but when the probability is very great that a fact exists, and the cause has gone off on some other point, against the rights of the party who claims the benefit of it, we think it our duty to afford him the opportunity of establishing it, especially as the sheriff, whose duty it was to have noted the precise time of his re-

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ceiving the process, has left that a blank in his return.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided, and reversed, and that the case be remanded for a new trial, the costs in this court to be borne by the plaintiffs and appellees.

Peirce for the plaintiffs, *Workman* for the defendants.

CLAGUE vs. *TOWNSEND* & *AL.*

The vendee is bound by the contract of lease made by his vendor.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This suit is brought for the recovery of a quarter's rent, of property leased to the defendants as set forth in the plaintiff's petition, and which became due on the 1st of July, 1822. The lease seems to have been executed by W. Kenner & Co. on the 22d of May, 1819 last, at which time the property rented belonged to said firm; and was effected by the agency of R. Clague, who is stated in the act to be a co-partner. The rent, therein stipulated to be paid by the defendants, is at the

rate of $2000 per annum. On the 10th day of April, in the year 1822, according to the allegation of the petition, and according to the date as given in the act of sale, in reference to the year of the Independence of the United States, but according to the date given by the Christian, in the year 1820, William Kenner sold to the plaintiff, all his interest in, and title to one undivided half of the premises, for which rent is claimed in the present action, by means of which sale the latter became sole proprietor, and as such, sues on the contract of lease made between the firm of Wm. Kenner & Co. and the defendants, for the full amount of rent due for one quarter, at the rate of $2000 per annum. being $500.

The defendants resist the payment of the whole amount thus claimed, on the ground that by a subsequent agreement between the parties to the written and authentic act of lease, the leasers contracted to reduce the rent for the year 1822, to $1650 per anumn instead of the $2000 formerly stipulated, and on this last contract they offer to pay $412 50 cts. and tender to the plaintiff that amount.

The only evidence offered in support of the latter agreement to reduce the rent, is found

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in an account current, as stated between the firm of Wm. Kenner & Co. and the defendants, signed by the former; in which they are credited for a quarter's rent which became due on the 1st of April 1822, at the rate of $1650 per annum; and this document was excepted to by the plaintiff's counsel, as being inadmissible, without first proving the verbal agreement by which the rent is said to have been reduced from $2000 to $1650, and as being contrary to the written evidence contained in the original case.

Before entering on the merits of the case as disclosed by the evidence, it is necessary to dispose of this bill of exceptions. It is an established rule that when parties to a contract reduce it to writing, no oral testimony will be received to alter or impair the obligations imposed on them by their written agreements. But it is the uniform practice of courts of justice to receive testimonial proof of the performance, and consequent discharge from obligations thus created. Such is proof of payment by the promisor, when money is the object of the contract, or the performance of any other promise or stipulation. So, perhaps, oral testimony would be admissible to prove

that a payee received part as a compensation for the whole sum promised; but certainly a written receipt, expressed in terms acknowledging that part was accepted in compensation and acquittance of the whole, would conclude the obligee from recovering on the original contract. The account offered in evidence, and signed by the promisors of the original contract of lease, amounts to an acknowledgement on their part, that they did receive $412 50, in full for the rent from the first of January to the first of April, and no arrearages could be recovered for that quarter. But it goes further, and states an agreement that the whole rent for the year 1822, should be $1650, which by the settlement of that account seems to have been understood and acquiesced in by all parties to it.

As to the objection to receiving the account in evidence, without first proving the verbal agreement to lessen the rent, we would only observe, that being written evidence of that contract, it is better than oral proof, which perhaps could not be received, and assuredly when higher evidence is given inferior, cannot be required to establish the same fact.

We are therefore of opinion that the court

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below did not err by receiving it in evidence. In coming to this conclusion on the bill of exceptions, we have said so much in relation to the weight of evidence contained in the settlement of accounts by Wm. Kenner & Co. with the defendants, that it only remains to state that in our opinion it amounts to a new agreement, and that too evidenced by writing between the contracting parties to the lease, to take $1650 instead of $2000 for the year 1822.

A question still remains, to ascertain whether this subsequent contract is binding on the plaintiff and appellant. In solving this difficulty, we assume as true that the contract of sale between Wm. Kenner and Clague, did not take place until the 10th of April, 1822. The latter, therefore, holds the property subject to its situation at that period: he can claim no other rights in it than belonged at that time to Wm. Kenner & Co.; one of these was a lease at the rate of $1650 for the year 1822, as reduced by contract from $2000, according to the agreement which is evidenced by the account, stated and settled on the 10th of March of the same year. The fact assumed as to the sale between the partners of the house of Wm. Kenner & Co. is taken on the allega-

tion of the petition and corresponding date by reference to the year of American independence, believing that 1820 is a mistake of date, which has crept into the record by some accident in copying.

It is the opinion of this court that there is no error in the judgment of the district court, and it is therefore ordered, adjudged and decreed, that said judgment be affirmed with costs.

Grymes for the plaintiff, *Preston* for the defendants.

STATE OF LOUISIANA vs. *ARMSTRONG & AL.*

APPEAL from the court of the second district.

The parish judge is not the officer in whose hands sheriff's bonds should be deposited.

PORTER, J. delivered the opinion of the court. This case comes up on an appeal taken by the defendant, who alleges, as error in the proceedings of the court below, that a document purporting to be a copy of a bond, given by a sheriff for the collection of taxes, was received in evidence on the trial. It has been submitted for our decision without argument.

The act of 1813, 1 *Martin's Dig.* 690, directs

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that the bond, to be given by the sheriff, shall be recorded in the office of the clerk of the parish court, and that a copy thereof shall be transmitted to the treasurer of the state.

An act passed on the day next succeeding that just quoted, (1 *Martin's Dig.* 700) provides that all securities, to be furnished by the different officers of government, shall be recorded in the office of the parish judges, of the parish where the property, affected by these bonds, is situated.

It was subsequently enacted, that in all cases where public officers, other than the governor, shall be empowered to approve of the bonds, to be given by persons appointed to office, it shall be the duty of the executive to send the commissions to those in whom the right of approval is vested, and that they shall not deliver the commission until the bond *is* given, and a certificate that it is duly recorded.

And further, that it shall be the duty of the person who receives these bonds, to deposite them, or cause them to be deposited in the hands of the person designated by law to that effect.—*Martin's Digest*, 712.

The counsel for the state, in the court below, and the judge seem to have proceeded

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on the idea that the parish judge was the *person designated by law to that effect.* But it appears to us the statute repels that idea.—The person who receives the sheriff's bond, is directed to deposite it with him who is designated for that purpose. The parish judge takes and receives the bond, he cannot therefore be depositor, and depository.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided and reversed, and that this case be remanded for a new trial.

Mazureau for the state, *Eustis* for the defendants.

WILLIAMS vs. *TREPAGNIER & AL.*

APPEAL from the court of the first district.

A judgment is not evidence against third parties of the truth of facts on which it was rendered.

PORTER, J. delivered the opinion of the court. The petitioner avers that he is the *bona fide* holder of a note made on the 24th August, 1813, in the parish of St. Jean Baptiste, by George Weimprender in favor of Achille Trouard, for $10,000, being the obligation given for the third instalment of the purchase money of a

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plantation bought of the payee of said note, which was transferred to him the petitioner, with all its rights, privileges and mortgages.

That the plantation which was mortgaged, to assure the payment of the price agreed to be paid by said Weimprender, has been seized and sold by the sheriff of St. Jean Baptiste, at the suit of Edward Livingston and Joseph Perret, and that a certain Etienne Trepagnier became the purchaser.

That Livingston and Perret have issued an execution on the bond of Trepagnier for the purchase money of the plantation, and are about to collect and appropriate it to their own use—though the petitioner has a right to be paid out of this purchase money in preference to these persons.

He concludes by praying that Trepagnier may be condemned to pay him $10,000, with interest and costs; and that it may be decreed, that Perret and Livingston's claims to the proceeds of this bond should be postponed until the petitioner's demand is paid and satisfied.

The defendants, Livingston and Perret, plead the general issue.

Trepagnier denies the allegations of the plaintiff, and affirms that he has always been

willing to pay the purchase money to whomsoever the court might direct, as soon as the irregularities and incumbrances, of which the respondent has complained in his petition against Perret and Livingston, shall be removed; and he prays that these cases may be consolidated with the present.

They were consolidated by an order of court, and in a short time after discontinued. It is contended that this discontinuance had the effect of putting an end to the present suit.

We are not of that opinion. The plaintiff states Trepagnier to be his debtor, and that other persons claim the money in preference to him. He makes these persons defendants. They appear and answer as such, and the parties are thus before the court, with the rights attached to the respective characters in which they present themselves. To permit the defendants to get other cases consolidated with that in which they were sued, and then turn the plaintiff out of court by dismissing these cases, would be permitting that to be done indirectly, which the law would not authorize directly, and would be virtually deciding that the latter could only get his plaint

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investigated when it pleased the former to permit him.

The first question presented is, whether the plaintiff has established his right as assignee of the debt he sues for. In deciding it we have found it necessary to distinguish between the parties defendant. The plaintiff introduces a judgment against Weimprender, the principal debtor—the note purporting a mortgage and parol evidence. As against Trepagnier who stands before the court as third possessor, this is enough. A positive provision of our code has made the judgment, act of mortgage, and oath of the creditor, sufficient to entitle the mortgagee to the extraordinary remedy of seizure and sale. The same evidence we consider good in an ordinary action, without the creditor's oath, as ample time is given to the person sued to disprove these facts, which *prima facie* make out a case against him. But, in regard to the effect which the judgment should have against persons other than third possessors, a quite different question is presented. The old and often applied maxim, that *res inter alios acta non nocet*, stands in the way of making parties rights depend on what is done between others. We had

occasion to enter fully into this subject, in the case of *Breedlove & Bradford* vs. *Turner*, 9 *Martin*. The judgment here produced, is evidence against the whole world that such a judgment was rendered, but it makes no proof against third parties of the truth of the facts on which it purports to be rendered.

Two witnesses were introduced on the part of the plaintiff. The one swears that it is fifteen years since he saw the indorser write, and does not think the signature, on the back of the note, is in his hand writing. The other does not state he ever saw Trouard write, but that he has had frequent opportunities to see his signature to documents, returns to commissions, &c. and that he "should take" the signature shown him to be the same as that subscribed to the documents. He declares, on cross-examination, that he would not receive in the course of business a note with a signature written in the same manner, without inquiry. It is our opinion that this evidence is too weak to establish the hand writing of the payee. One witness negatives the fact and the other is not certain of it.

This failure of the plaintiff to make out his case against the co-morgagees, renders it im-

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proper to give final judgment against the third possessor. As the case stands, we see by the pleadings that there are several persons who set up conflicting claims to the amount due on this bond, and it is necessary these claims should be settled before Trepagnier is condemned to satisfy any of them. This cannot be done now, for the plaintiff is as two of them, out of court, and a judgment against Trepagnier would not be binding on them. We see no way to do justice between the parties but to remand the case for a new trial.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed; and it is further ordered, adjudged, and decreed, that the case be remanded for a new trial, and that the appellee pay the costs of the appeal.

Hennen for the plaintiff, *Livingston* & *Denis* for the defendants.

POTTER vs. *RICHARDSON*.

A person bound under an order of court to give surety must give persons residing within the state.

APPEAL from the court of the third district.

MARTIN, J. delivered the opinion of the court. Potter filed his petition, stating that

in 1819, he purchased from W. A Richardson a slave, for $1500, payable on the 1st of Jan. 1821, and mortgaged a house for the price; that he refused payment, having discovered that the title to the slave was in Richardson's father; and he was 40, instead of 37 years of age as the vendor had represented, and ignorant of the trade of a mason or bricklayer, although he was expressly sold as such.

That Richardson having brought suit, at October term, 1821, in the absence of the petitioner, obtained a judgment, by which an injunction, which the latter obtained to stay an order of seizure of sale procured by the former, was dismissed, and judgment for costs given for the present petitioner, and the order of seizure and of sale, theretofore granted and enjoined, staid, until the 1st of January following, and until Richardson gave good and sufficient security to indemnify his vendee for all damages which he might suffer from an eviction.

That the executors of F. Richardson, the father of W. A. Richardson, have tendered a penal bond to the petitioner, to secure him in the title and possession of the slave; that the said bond is invalid, as it will not protect the

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petitioner against the claims of F. Richardson; that in the state of Mississippi, in which the testator lived and died, and where his executors reside, executors cannot dispose of slaves, without certain formalities, which were not, in the present case, fulfilled.

That W. A. Richardson pretended to your petitioner that he had a powerof attorney from his father to sell the slave, and promised to have it duly recorded, but has absolutely neglected to do so.

That notwithstanding this he has procured a seizure of the mortgaged property by the sheriff, who is preparing to sell it.

The petition concluded, that as Richardson had not complied with the terms of the judgment, by giving bond as thereby required, an injunction might issue.

The injunction was accordingly granted.

Richardson's answer states that the injunction is illegal, as the facts set forth in the petition (if true) are insufficient, and the facts alledged on the ground of the order of seizure, are incorrectly stated.

On motion of Richardson the injunction was dissolved, and judgment for costs given in his favor.

The judge has certified that Richardson's attorney moved to dismiss the petition for the injunction, after the suit was at issue, as appears by the answer, on the ground that the petition contained no equity on the face of it. This motion was opposed by Potter's attorney on the ground of surprise, and of its being an indirect attempt to get rid of the suit, without putting it on its merits. He at the same time offered an affidavit for a continuance. His objections being overruled, he took a bill of exceptions. He appealed.

His counsel urges that,

1. The judgment on which the execution issued is *alternative* and void.

2. The sale of the slave was void, he being the thing of another.

3. The bond tendered, in performance of the judgment, is not the one it required. The executors' bond does not answer; the heirs themselves ought to have been bound.

4. Legal freehold sureties resident within the parish of Feliciana was not given.

5. The power of attorney should have been recorded.

6. The suit should have been tried on the

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merits, and the appellant's testimony should have been heard.

The counsel has referred us to *Harrison's Chan. Pract.* 545; *Fowler's Exchcq. Pract.* 283; 2 *Veazy & Beams*, 412–13; *Eden on Injunctions*, 65—6; *Civil Code*, 434, *art.* 25; *Part.* 3, 3, 1.

The two first and the fifth points are applicable to the judgment related in the petition, which is not appealed from, and the record of which is not brought up.

The judgment stays the order of seizure, till good and sufficient indemnity be given against all damages, which the appellant may hereafter suffer by an eviction of the slave. Richardson's own bond, with proper sureties would certainly have sufficed; that of any other person with proper sureties is still better; for the obligation of the principal in the bond is an additional security, as Richardson is equally bound personally to indemnify his evicted vendee, whether he executes a bond or not.

The party who is bound under an order of court to give surety, must give persons residing within the state, and answerable to the process of her courts, *Civil Code*, 432. The order of the court which required sureties to

be given, was not therefore complied with by the tender of the bond, of persons residing in the state of Mississippi. On this law the injunction was improperly dissolved.

It is thefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed, and the case be remanded to the district court, with directions to proceed therein, as if the injunction had not been dissolved, the costs of the appeal to be borne by the appellee.

Preston for the plaintiff, *Eustis* & *Watts* for the defendant.

POTTER vs. *RICHARDSON.*

APPEAL from the court of the third district.

If a petition for an injunction is dismissed for want of equity appearing on the face of it, the appellate court cannot take notice of evidence said to have been introduced.

PORTER, J. delivered the opinion of the court. The proceedings in this case are fully stated in the opinion already given, so far as they then appeared on record. After the pronouncing of the decree the appellee moved for a re-hearing, which being granted him, he suggested a diminution of record, and obtained a *certiorari* to send up all that remained of it.

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The return made by the clerk to this writ, shows that on the 10th January 1822, there was filed in his office the bond of W. A. Richardson the defendant, and one H. W. Hill, of the parish of Feliciana, in the penal sum of two thousand five hundred dollars, conditioned in pursuance to the judgment entered up by consent of parties, on the 19th October, 1821.

It is contended on behalf of the plaintiff that this court can take no notice of this obligation, as it does not come up in the manner prescribed by law, for placing the facts on which causes are tried, before us.

Before examining this question, one raised by the defendant must be disposed of. He insists that the court below improvidently granted the injunction in the first instance; because the petition does not on the face of *it* show sufficient equity.

We have examined it and think it does. The plaintiff swears, that the defendant has failed to comply with the tenor and effect of the judgment, according to law and justice; and then states that it is true *a bond of the executors* was tendered him. This amounts to the same thing as if he had sworn positively the

bond now sent up was not tendered him. It was said he should have expressly negatived it; but if in point of fact it was not presented to him, and another bond of the executors was, how could he swear more positively, than to say the judgment had not been complied with according to its tenor and effect.

The plaintiff is right in his objection, that the proof of the bond being executed and tendered, does not come regularly before us. The case stood upon petition and answer, and the general issue was pleaded. It appears to have been dismissed for want of equity on the face of the petition. This excludes the idea of any examination of the merits being gone into in the court below; and we cannot therefore notice in the appeal, documents which would go to show that dismissal to have been supported by evidence which was not introduced, or which the opposite party had not the means afforded him to controvert.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be annulled, avoided, and reversed, and this case be remanded to the district court, with instructions to proceed thereon as if the injunc-

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tion had not been dissolved—the costs of the appeal to be borne by the appellee.

Preston for the plaintiff, *Eustis* & *Watts* for the defendant.

GANSEFORD vs. *DUTILLET* & *AL.*

An agent has a lien on goods placed in his hands for sale, and it is not lost by depositing them in the hands of a third person.

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. The petitioner states that a quantity of hardware and ship-chandlery belonging to him, was sold by Dutillet & Sagory, auctioneers, for the sum of $1338 18 cents, and that though often requested, they have refused to pay over the proceeds of the sale. Judgment is asked against them and their surety, Joseph Tricou, for this amount, and a prayer that their claims being founded on a deposit, may be decreed to be paid as a priviledged debt.

The defendants, Dutillet & Sagory, having become insolvent after the inception of the suit, their syndic, N. Cox, was made a party. He appeared and answered that no effects of any kind whatever had come into his hands

belonging to the insolvents, and prayed to be dismissed.

Tricou the surety pleaded the general issue, and that the claim of the petitioner had been satisfied.

There was judgment for the defendants and the plaintiff appealed.

An agreement signed by the counsel in the cause appears on record, by which "it is admitted that the goods of the plaintiff sold for the price mentioned in the petition, and that the defendants, Dutillet & Sagory, have received the same, and that the only defence of the defendants is the payment of said sum."

The facts from which this defence is deduced, are as follows:—On the 21st of April, 1817, a certain J. Latapie, who was agent and attorney in fact of the plaintiff, wrote to Dutillet & Sagory, informing them that he had sent them four barrels and one case of hardware, which he requested them to keep in their store until Mr. Francis Dreux should give them new instructions respecting them. The letter concludes with the following paragraph—*veuilliez prendre note que sur ces marchandises il me revient*, $538 50 *cents. non compris les intérêts*

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jusqu'à parfait payment, pour frais et deboursés y relatif.

Dreux, the individual mentioned in the letter, deposes that Latapie, on leaving this country for France, left with him a power of attorney; that among other matters that he was charged with, was that relative to the hardware, which Latapie told him he had left with Dutillet & Sagory to be sold for him, and in respect to which he had left with the witness several papers. Some time after Latapie wrote the deponent to hand them over to Rouquette, whom he had constituted his attorney in fact. This was done, and Dutillet & Sagory informed of the change in the agency, and directed by the witness to proceed in the sale of the property and pay over the amount to Rouquette. It was about a year after the departure of Latapie, that Dreux gave up the papers to Rouquette, and about one month and a half after that time the latter acknowledged he had received the proceeds of the sale of hardware. Nicholas, formerly a clerk of Rouquette, deposes that it is to his knowledge the amount for which the property sold, was paid to his then employer.

If these facts stood alone, they would per-

haps support the defendants plea, but the transaction has a quite different aspect when we examine the plaintiff's evidence.

On the 21st April, 1817, as we have already seen, Latapie put the goods into Dutillet & Sagory's hands. Between that time and the 24th Sept. 1817, they must have received some communication respecting the property from the plaintiff for on the day last mentioned they write: "We have received the letter with which you have honored us, 30th June. M. Latapie has in fact left with us four barrels and one case of hardware, which he told us belonged to you, and to hold subject to your order."

After stating the difficulties that must attend disposing of them as the plaintiff wishes, they add, *en conséquence nous garderons votre qnincaillerie à votre disposition, jusqu'à ce que vous donniez l'ordre positif d'en finir, à moins que nous ne trouverions à le placer à dix pour cent bénéfice*: therefore we shall keep your hardware at your disposition, until you give us a positive order to close sales, unless we find the means of selling it at ten per cent. profit. On the 18th January, of the following year, they again wrote the petitioner, stating that they had not been able to make sales of the hardware

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left by Mr. Lapatie, and that the only way to close was to put the property up at auction.

The question therefore for decision is, whether on the evidence just stated, the payment to Rouquette was good. For a correct solution of it, it is necessary to ascertain whether Dutillet & Sagory were, after the writing of the letters from which we have made extracts, the agents of Ganseford; if they were, there can be no doubt the payment to Latapie's attorney in fact, cannot be pleaded to the present action.

We think it does clearly result from the testimony, that Dutillet & Sagory were the plaintiff's agents. In their letter to him, they avow in the most explicit manner, that Latapie left the goods with them, stating that they were Ganseford's property, and to hold them subject to his order. They engaged in this letter to do so, and promised in it not to sell them until they received his instructions, unless they were able to procure ten per cent. profit. After entering into this contract, which they were justly authorized to do, for Latapie had delivered them the goods as the plaintiffs, we cannot discover why they paid Rouquette.—Latapie's authority over the property ceased

from the moment the principal ratified his act of putting the merchandise into the hands of his attorney. *Civil Code*, 37, 36. A fact which is clearly shown him by the letter of the defendants, acknowledging the receipt of the plaintiff's instructions. If after all this, they thought that Rouquette had authority to receive the proceeds, it was *crassa negligentia* in them not to have taken better information, and it was in the very teeth of their promise, that they would hold the property subject to the directions of the plaintiff.

The right of the defendants to retain the amount which Latapie informed them he had a lien for, when he placed the goods in their hands, leaves another question to be examined. We think they have the right. The goods passed into their hands with this lien; a payment made by them at that time would have been good. Nothing is shown which renders it improper since. The owners of the goods availing themselves of the delivery of their agent, must submit to the qualification, under which he made it. The contract, under which the auctioneers sold the goods, was not gratuitous: it was not therefore one of deposit, and

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cannot be paid as a debt privileged over other creditors.

It is therefore ordered, adjudged and decreed, that the judgment of the parish court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiff do recover of the defendants the sum of seven hundred and ninety-nine dollars, 68 cents, with costs in both courts.

Denis for the plaintiff, *De Armas* for the defendants.

RICHARDSON vs. *PACKWOOD.*

One partner may accept title to real property for the benefit of the whole firm, but cannot alienate to their prejudice, without express consent on their part.

If a person possesses under a title which proves on investigation to be deficient, may reasonably have believed it was perfect, & valid, he ought not to be considered as a knavish possessor.

APPEAL from the court of the first district.

MATHEWS, J. delivered the opinion of the court. This is a petitory action in which the plaintiff claims title to one undivided half of three lots of land, in the city of New-Orleans, as set forth and described in his petition. The defendant denies all right in him to said property, and claims it for himself *in toto* as having acquired title thereto from the legal owners and possessors. There was judgment for the plaintiff in the court below, from which the defendant appealed. Both parties claim title as derived from John M'Donough, through A. L.

Duncan, who it is agreed purchased, as agent for John Wood & Co., with their funds, or rather took, in payment of a debt due to said firm, the premises now in dispute, which he held as agent and attorney aforesaid, from the 18th day of July, 1808, by virtue of a deed of conveyance made and executed in the ordinary form of an act of sale, until the 1st of April, 1812, when he transferred and conveyed to George Barret, as surviving partner of the house of John Wood & Co., all the right and title to the property described in the act of transfer, which he had acquired, by virtue of the sale or giving in payment from his transferor. Afterwards, in the year 1817, Charles Barrett and other persons, claiming title to the disputed property, as legal representatives of said George Barrett, sold and conveyed the whole to the defendant, as belonging exclusively to them, by deeds of sale in the usual form, with a clause of joint warranty. The record comes up, loaded with documents and testimonial proof, which in our opinion have a very remote affinity to the real contest between the parties litigant: But as the defendant's counsel deduces one of these points from this extraneous matter, viz. that the action cannot be maintained, it is proper to notice it so far as may be necessary to a just refutation

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of the defence, based on such evidence; and such, in our opinion, is all that which relates to the joint settlement of accounts between the partners of the house of John Wood and Co., which, together with the point raised upon it, we dismiss without further comment; except barely observing, that a vested right and title of partners to property acquired by them cannot, in any case, be affected by an unliquidated state of their partnership concerns. If the right and title be to things appertaining to their business as traders, such as necessarily make a part of their commercial transactions, they may be disposed of, by any one of the partners, without reference to the state of accounts between themselves. But real property acquired, which does not enter directly as a part of their stock in trade, must be subject to the rules by which the dominion of such things is transferred from one proprietor to another. A second reason in support of the same point is, that the plaintiff has not alleged or shown that he ever had possession of the premises now claimed against an adverse possession with title and good faith. Without enquiring into the right of action which may accrue to the purchaser of property to whom it has been sold, whilst held by a third person, claiming under a title opposed to that of

the vendor, we deem it sufficient to state that the possession of Duncan, if he be considered as agent for John Wood & Co., was a possession for every member of that company to the extent of his right as a partner. Having acquired the title and possession for all the partners of that firm, although not in their names, he could not, consistently with justice and good faith, have assumed an adverse title and possession, as he had the intention to acquire for said firm and not for himself; which is fully expressed in the deed of conveyance from him to George Barrett.

There can be no doubt of the sufficiency of the allegations in the petition to maintain the plaintiff's action; and it only remains to investigate the titles of the parties to the suit, as set forth by the pleadings.

As they both claim under M'Donough by title derived through Duncan, it is unnecessary to enquire into the consideration for which the former transferred the property to the latter, or into the validity of the vendor's title. The first enquiry necessary is, for and on account of whom did Duncan acquire the disputed premises? Secondly, What title did George Barrett acquire from him? The first question is fully and satisfactorily answered by the consi-

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deration stated in the deed of conveyance to said George Barrett; for these two deeds must be taken and considered together as evidence of the conflicting titles of the parties to the present suit. The legal title to the premises was conveyed by M'Donough to Duncan, which by a public and authentic act he acquired in his own name, and might, (notwithstanding the latent equitable claim of John Wood & Co.) have conveyed it, with full and entire property and dominion, to a *bona fide* purchaser. This he never attempted to do, but faithful to his duties as agent for John Wood & Co., he held the real estate which he had acquired for them and with their means, until one of the partners appeared, to whom he conveyed as survivor of the house; which turns out not to be true, as plaintiff claims one fourth part of the property as a partner of the firm of John Wood & Co. and another fourth as purchaser from the heirs and representatives of one Wheeler, who was another partner of said firm, making together the one half claimed as above stated; as admitted by the statement of facts. But whether George Barret was or was not the survivor of the house, in acquiring real estate for and in the name of the firm, he acquired a title for the legal representatives and heirs of the deceased

partners, if they were all dead except himself; or, if part were living and part dead, then for the survivors and representatives of the deceased, according to their interest in the partnership. On the deed from Duncan to Barrett, after the premises having expressed the sale or transfer to be to the vendor as surviving partner, &c., our attention is called to the *habendum* which is said to restrict the title solely to him and his heirs: In construing deeds, the first rule is to give full effect to the intention of the parties; which ought to be gathered from the whole context of the instrument, so as to give force to all its parts. Now were we to give the effect to the clause of *habendum* insisted on by the defendant's counsel, it would wholly destroy the premises so far as they relate to the situation of the purchaser as partner of the firm of John Wood & Co.; which would not be consistent with the rule above stated. No violence is done to either member of the act of transfer, by considering that Barrett and his heirs were to hold for the benefit of the firm aforesaid. But the expression of the consideration of the transfer from Duncan to Barrett puts the matter beyond a doubt. He explicitly states that he acquired and held the property for John Wood & Co., and in the capacity of their agent conveys to

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them by means of the acceptance of one of their partners; whose act of acceptation conferred a title to all for three undivided portions, in conformity to the contract of partnership, of which they can only be divested by their consent evidenced, as required by the laws of this state in sales and conveyances of immovable property. One partner may accept title to real property, for the benefit of the whole firm, but cannot alienate to their prejudice without express consent on their part. From this view of the subject, we conclude that the two first points filed by the defendant, on the appeal, are not supported either by the law or evidence of the case; nor can they derive any support from the alleged silence of the plaintiff, during the negotiation and final sale from Barrett's successors to the defendant. It does not appear that he, the plaintiff, knew what interest they were about to alienate. The written title itself to George Barret was sufficient to put a purchaser of common prudence on his guard. Add to this, the occurrences which took place before a skillful notary and gentleman learned in the science of law, in the attempt of a sale through the agency of Mr. Brandegee, as detailed by the testimony of Mr. De Armas and the latter; and we think, that there ought to be no hesita-

tion in declaring that this means of defence entirely vanishes.

As to that part of the judgment of the district court which relates to damages, we have some doubt. It is a principle of our law that a possessor in good faith, believing himself to own property, is not responsible to the real owner for the rents and profits of the property thus holden, until after a judicial demand. If a person, who possesses under a title, which proves on investigation to be deficient, may reasonably have believed that it was perfect and valid, he ought not to be considered (as the law expresses it) a knavish possessor. This principle of law is just and equitable, and ought to take effect in all cases, where the want of good faith does not clearly appear. Owners ought to know their rights, and ought to pursue them promptly, and not suffer possessors who may believe themselves to be just proprietors, to act as masters of the things they possess, and be afterwards made responsible (all at once) in large sums, as damages to the true proprietors. Notwithstanding our belief, that the defendant did not acquire title to more than one half of the property in dispute, by the conveyance from Charles Barrett and

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the heirs of George; yet, from the nature of the whole transaction, it is thought that he may have been a possessor in good faith, for the whole, as it was all conveyed to him. The plaintiff should have pursued him sooner.

We therefore conclude, that the plaintiff and appellee has shown a good legal and equitable title, to one undivided half, of the lots of land, sued for as described in his petition; but that the defendant is bound to account for one half the profits arising from said property, only from the judicial demand, and at the rate of six hundred dollars per annum: and consequently,

It is ordered, that the judgment of the district court be avoided and reversed, and this court proceeding to give such judgment as i their opinion the district court should have rendered, do order, adjudge and decree, that the plaintiff do recover from the defendant, the one undivided half of the lots, as described in his petition; and he is hereby confirmed in his right and title to the same, as against the present defendant: And it is further ordered, adjudged and decreed, that the plaintiff do recover of the defendant, the sum of six hundred dol-

lars per annum, from judicial demand until he be put in possession of one half of the property adjudged to him, with costs in the court below; and that the appellee pay the costs of this appeal: And it is further ordered, that the case be remanded, so that the proceedings directed by the decree of the district court, to enable the prayer for partition to be finally acted on, may be had in the court below.

Maybin and *Smith* for the plaintiff, *Duncan* and *Hennen* for the defendant.

RICHARDSON vs. *PACKWOOD*—*Ante p.* 290.

APPEAL from the court of the first district.

If a plea to the jurisdiction be not noticed in the argument in the supreme court, it is presumed to be abandoned.

The right to transfer a case to the district court of the U. States, must be claimed on the entering of appearance in the state court.

Jurisdiction once vested cannot be taken away by the act of either of the parties.

PORTER, J. delivered the opinion of the court. The defendant has applied for a rehearing, on the ground that he has a right to obtain the opinion of the court, on a bill of exceptions taken to the decision of the judge, *a quo*, refusing to transfer this case to the district court of the United States for the Louisiana district. There is no doubt but parties have a right to ask the opinion of the court on all questions necessary to a decision of the case in which they arise; but, as that to which

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our attention is now called, was not inserted by the appellant, in the points filed, nor noticed by his counsel in the very elaborate argument which they made on the merits, it was a necessary conclusion of this court, that an exception, which would have precluded any enquiry into the merits, was waved or abandoned.

On examining the record, we see nothing to induce us to believe, the appellant could derive any benefit from obtaining a rehearing. The act of congress which confers on a citizen of another state, sued in a state court, the right to transfer his case to the circuit or district court of the United States, (as the case may be) requires him to claim the right at the time of entering the appearance in the state court. In the present case, Packwood appeared, and answered in the month of June, and did not apply for a removal until the 16th January following.

This neglect is not cured by the allegation, that he claimed this right on his appearing to answer the supplemental petition, for the filing that petition did not make a new case, it was a continuation of that already commenced, and an amendment of the original petition, to which the defendant had appeared and answered.

Nor did it make the case of the appellant better that he had become a citizen of New York, after the institution of the suit, it being a well known principle of law, that jurisdiction once vested cannot be taken away by the act of either of the parties. 2 *Wheaton* 297.

The rehearing is therefore refused.

THOMPSON vs. *FLOWER & AL.*

The drawer of a bill of exchange, cannot recover against the acceptor, without proving that the interest of the payee is vested in him.

And the circumstance of the indorsement being stricken out does not furnish proof of this fact.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The petitioner states, that in the beginning of the year 1820, the defendants being indebted to him, he drew a bill of exchange on them in favor of M'Lanahan & Bogart, for $5000, which bill was accepted, but on becoming due, was dishonored: that in consequence thereof, it was returned, and no part of it being yet paid, the defendants owe the sum mentioned with interest, damages, and costs.

The defendants pleaded the general issue, and want of consideration. The district court gave judgment against them, and they appealed.

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There is a bill of exceptions to the decision of the judge, on applications for a continuance, and a commission to take testimony in the state of Maryland, on which it is not necessary to express any opinion; for admitting they were correctly refused, the evidence does not authorise us to affirm the judgment of the court below.

The bill produced on trial shows, that the defendants, by their acceptance, engaged to pay M'Lanahan & Bogart the amount therein mentioned, and the defendants insist that the legal interest in the draft, being on the face of it, vested in the payees, the plaintiffs cannot recover without showing that this interest has been transferred to them. On general principles, there is no doubt this position is correct, and the only question is, whether this case came within their operation. The plaintiff contends that it does not, and that it is sufficient for the drawer to prove, the acceptance of the bill by defendants, its protest for non payment, and its return. We have looked with great attention, but in vain, for any authority to support this exception. The rule, on the contrary, appears to be, that when the drawer of the bill sues the acceptor, he must establish that the bill was

accepted, demand of payment of the drawee, and refusal, the return of the draft, and that it was paid by the plaintiff. 2 *Phillips*, 32. *Chitty on Bills*, 396. *Kyd on Bills*, 269. This rule, it is said, does not apply where the payee is merely agent for the drawer. Conceding that this doctrine is correct, the plaintiff's case is not in the least advanced by it; for it is neither alleged, nor proved, that M'Lanahan & Bogart were the agents of the drawer. The petition is entirely silent on that fact, and no evidence was offered of it. Are we authorised to presume it? We apprehend not: we might as well presume any other fact necessary to make out the plaintiff's right to recover.

It has however been urged that proof of this agency results from the circumstance of the indorsement of the payees being stricken off the bill. But why the one fact is to be inferred from the other, we are unable to see. We think on the contrary that endorsing it in their own names is rather an evidence of their having an interest in it. If this in itself be considered proof of agency, then every case where a bill had been negotiated and returned on the drawer with the name of the payee obliterated, would offer the same proof that the latter acted

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as the agent of the former. This would be going quite too far. On the whole, we think the case resolves itself into the narrow question. Is the mere possession of a bill of exchange such evidence of a right to it, that the holder may sue for and recover the amount from the acceptor? We think there cannot be a doubt that it is not.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided and reversed, and that there be judgment for the defendants, as in case of nonsuit, with costs in both courts.

Duncan for the plaintiff, *Livermore* for the defendants.

BOISMARRE vs. *JOURDAN.*

Promise to pay interest for the renewal of a note, means bank interest.

The judgment of the inferior court, on matters of fact always prevails in the supreme court unless manifestly erroneous.

APPEAL from the court of the parish and city of New-Orleans.

PORTER, J. delivered the opinion of the court. The plaintiff states himself to be the surviving partner of the late firm of Le Vilain & Boismarré, and that the defendant is indebted to him in his individual character, and as sur-

viving partner of the said house in the sum of three hundred and ninety-four dollars, eighteen cents, being the balance of moneys paid and advanced, and goods sold and delivered, to the defendant.

The general issue and compensation were pleaded. According to the statement of facts signed by counsel, the account filed is admitted to be correct, except,

1. $24 50, paid to Tessier for interest;
2. $4, charged for binding books;
3. $151 37, for merchandise furnished Felix Paul;
4. $200, amount of a note not due when suit was brought;
5. $4, for a waistcoat sold to plaintiff by defendant;
6. $40, paid by Felix Paul, on account.

The objection to the first of these items is not supported by proof. Jourdan's engagement to pay interest for the renewal of his note, must be understood bank interest, and nothing more. It cannot be presumed he meant usurious interest: a deduction of $14 must therefore be made from this charge.

The second also, is incorrect. The plaintiff

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received the books bound, and should pay for the binding.

The third item is disputed on the ground, that the defendant never made himself responsible for this debt, and if he did, that he was nothing more than surety. If the defendant wished to avail himself of the privilege which the law confers on sureties, to compel the creditor to sue first the principal debtor, he should have put in the plea of discussion, pointed out property to discuss, and furnished money enough to carry that discussion into effect. *Civil Code*, 430, *art.* 8 & 9. As to this not being the debt he contracted for, the evidence leaves the fact doubtful, and we adopt the conclusion of the court of the first instance, as we always do on questions of fact, unless the decision is clearly erroneous.

The demand of $200 was premature, as the note was not due. The law, under certain circumstances, permits a creditor to resort to cautionary measures to assure the payment of his debt; but the defendant is not shown to have been so circumstanced. *Acts of* 1817, *p.* 26, *sect.* 13. The creditor's right to sue, is founded on the debtor's default to pay, and there is no default, until the term accorded, is

expired. This sum must therefore be deducted, reserving to the plaintiff his right to enforce it according to law.

The claim for the waistcoat does not appear to be disputed.

We see no evidence, which authorises us to come to a different conclusion from the parish judge, in respect to the set-off of $40.

The defendant's plea that no action lies against him for any balance that may be found due, because Le Vilain & Boismarré consented to make him advances, on the condition, that they were to be paid by collections they should make of debts due Mr. Jourdan, to be placed in their hands for that purpose, does not appear supported by proof. The letter of the firm, offering to make the payments and requiring the power of attorney from defendant, to cover their engagements, is dated the 10th July, 1822. This power does not appear to have been furnished; and, admitting that the letter of 22d December of the same year is equivalent, it came too late: the defendant had no right to delay the plaintiff six months in the collection.

It is therefore ordered, adjudged and de-

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creed, that the judgment of the parish court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the plaintiff do recover of the defendant, one hundred and seventy-five dollars, 68 cents, with costs in the court below; those of the appeal to be borne by the appellee: saving to the plaintiff his legal right on the note, for $200, prematurely sued for.

Quemper for the plaintiff, *Moreau Lislet* for the defendant.

YOUNG vs. *CENAS & AL.*

A party not injured by a judgment cannot appeal from it.

APPEAL from the court of the first district.

PORTER, J. delivered the opinion of the court. The petition states, that the plaintiff, on the 29th April, 1807, purchased of M. G. Cullen & Co. two bills of exchange on Liverpool, for a certain sum sterling, which amounted to $3600, lawful money of the United States; for which bills he gave in payment a note of Samuel B. Davis, in favor of Harper & Folk, and indorsed in favor of the petitioner, for thirty-six hundred dollars.

That one of the said bills of exchange, for £489 12*s.* has been returned protested for non payment, which the plaintiff has been obliged to take up and pay, with damages and costs. He therefore prays, that Davis' note, which is in the hands of Blaisè Cenas, assignee of Cullen & Co., may be delivered up to him, and that Davis be made a party to the petition, and condemned to pay the amount of the note, with interest and costs.

The defendants joined in the defence, and answered that Davis had paid the amount of the note to M. G. Cullen & Co. by way of set-off, though the same remained in the hands of Cenas, ready to be given up or disposed of as the court might direct; and Davis, in his individual capacity, denied the right of the plaintiff to have the obligation delivered to him.

This action appears to have been commenced so far back as the year 1808. In the year 1813, on a suggestion of the death of Blaisè Cenas, the suit was revived against the widow and executrix. She appeared, and pleaded the general issue.

In the month of December, 1817, the plaintiff discontinued his suit against Davis, and ob-

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tained leave to amend his petition.

On the 26th February, 1822, the court gave judgment, that the defendant hand the note of Davis to the petitioner; and nearly one year after, Davis appeared and prayed an appeal from this judgment, stating that he was aggrieved by it.

The principal question in this case is, whether Davis has suffered such injury from the judgment rendered, or, in other words, has such an interest in it, as will authorise him to appeal. We are clearly of opinion that he has not.

In the first place, the judgment given does not at all affect his interests: it forms not *rem judicatam* against him. In the second, if the plaintiff should hereafter sue the defendant, the former will have to prove against the latter, the same matters, in order to entitle him to recover that he would, in the case now before us, had he continued to prosecute Davis to final judgment: and the same means of defence will be afforded the appellant. If his case be a legal and *bona fide* payment, it cannot be affected by the circumstance of his being sued jointly or separately: in either case, the defence which

such payment will authorise, can be used with equal force and success.

The appeal is dismissed, with costs.

Morse for the plaintiff, *Hawkins* for the defendants.